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Garcetti v. Ceballos: Clarifying the Constitutional Dimensions of Public Employee Speech

By Jin S. Choi

Jin S. Choi is a partner at Franscell, Strickland, Roberts & Lawrence in Glendale and co-authored the Petition for Certiorari and Brief on the Merits filed with the United States Supreme Court in the case of *Garcetti v. Ceballos*, on behalf of the County of Los Angeles and the individual defendants. His areas of practice include civil rights and employment law.

First Amendment jurisprudence in the public employment setting has been given a much-needed jolt of clarification. The Supreme Court's recent decision in *Garcetti v. Ceballos*, 126 S.Ct. 1951 (2006) addressed a question that had created irreconcilable rifts among the federal circuits—whether public employees enjoy First Amendment protection for speech expressed strictly pursuant to their official job duties. The widespread confusion regarding this issue resulted in large part from the fact that the Supreme Court's decisions from the past 40 years had clarified the constitutional analysis as to only two scenarios—that the First Amendment protects public employees when they speak "as citizens" on "matters of public concern" but not when they speak "as employees" regarding personnel grievances.[1]

The Supreme Court, however, had not yet addressed what is probably the most prevalent form of public employee speech—*speech regarding matters of public concern expressed pursuant to official job duties.*[2] In holding that the First Amendment does not protect such speech, the Supreme Court wisely rooted its analysis in the most relevant legal and historical context and gave due consideration to the inevitable consequences of affording *all* such speech with constitutional protection. A contrary holding would have constitutionalized *every* instance of public employee speech regarding matters of public concern, thereby dramatically undermining the ability of public employers to manage their workforce and efficiently carry out their services to the public.[3]

THE EVOLUTION OF FIRST AMENDMENT PROTECTION IN THE PUBLIC EMPLOYMENT SETTING

The First Amendment safeguards the freedoms that were fundamental to the foundation of our country—freedom of speech; freedom of religion; and freedom to associate. Indeed, in protecting against undue governmental encroachment on the freedoms of speech and press, the First Amendment has ensured the right of every citizen to *participate in public debates and contribute to the free marketplace of ideas*—no matter how contrary to the mainstream one's ideas and beliefs.[4]

It may then be surprising that until a relatively recent time in our nation's history, public employees enjoyed no First Amendment protection from adverse

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— *Inside the Review* —

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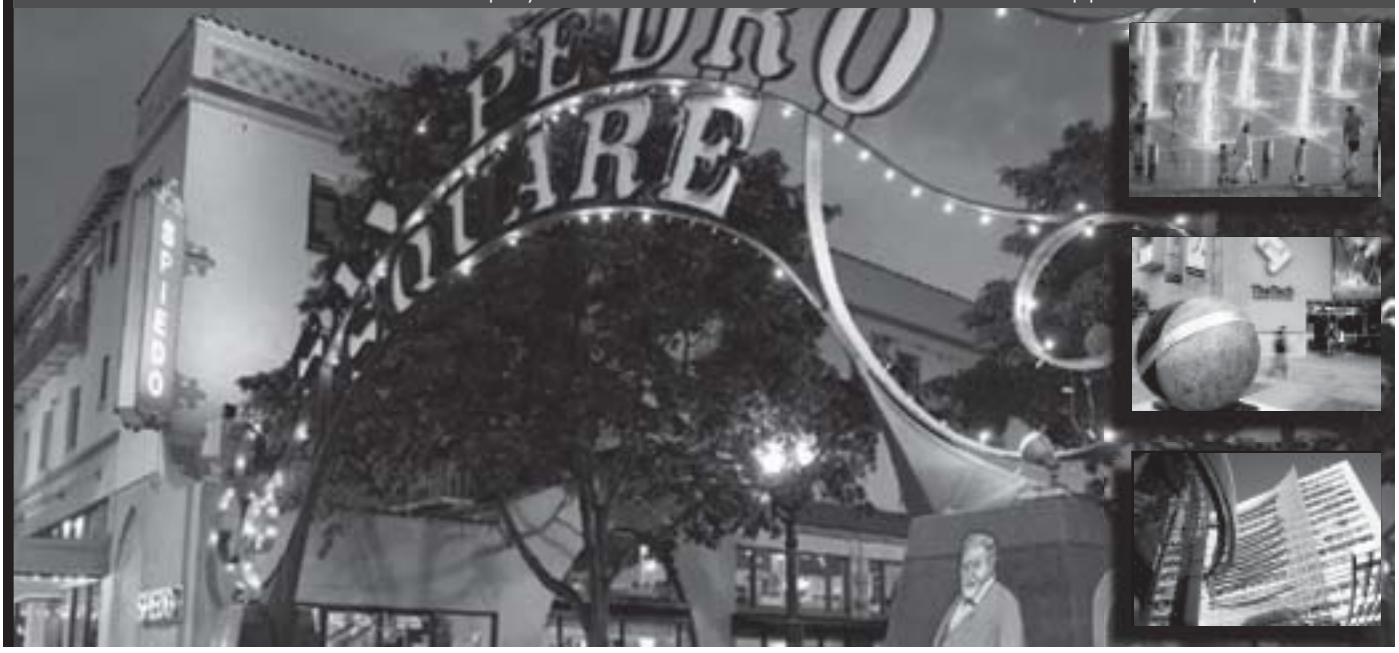

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❍ [2] Pick a Little, Talk a Little—Picking a Jury
❍ [3]Introduction to Employment Law: A Plaintiff's and Defendant's Perspective
3:15 p.m.–4:30 p.m.
❍ [4] Substance Abuse in the Legal Profession
❍ [5] The Latest from the NLRB: Is the Board's Move to the Right in the Long-Term Interest of Employers or Employees?
❍ [6] Restrictive Covenants, Non-Competes and Trade Secrets: The In-House Technology Industry Perspective

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11:30 a.m.–12:30 p.m
❍ [7] The Inside Scoop—What You Really Need To Know About DFEH/EEOC Investigations
❍ [8] Using the Computer Fraud and Abuse Act in Employment Cases
❍ [9] Witness Examinations: A Live Demonstration
1:45 p.m.–3:00 p.m.
❍ [10] Free Speech in the Workplace: Employee Rights vs. Employers' Need to Regulate Its Official Message
❍ [11] Public Sector Legal Update
❍ [12] Discovery Issues in Employment Law
3:15 p.m.–4:30 p.m.
❍ [13] Leaves of Absence: Navigating the Laws Governing all Types of Leaves Available to California Employees
❍ [14] Transgender and Other Diversity in the Legal Profession
❍ [15] Winning Opening Statements and Closing Arguments: Live Demonstrations

Navigating Uncertainty: An Inside Look at the ADA and FEHA Disability Requirements

By Daniel A. Ojeda

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When President Bush signed the Americans with Disabilities Act (ADA)[1] into law in 1990, he likened it to the destruction of the Berlin Wall, exclaiming, "Now I am signing legislation that takes a sledgehammer to another wall, one that has for too many generations separated Americans with disabilities from the freedom they could glimpse but not grasp."[2]

More recently, politicians have offered divergent views regarding whether the ADA has fulfilled President Bush's promises. During a fifteenth anniversary celebration of the law, Alaskan Governor Frank Murkowski stated, "the Americans with Disabilities Act of 1990 is one of the most compassionate and successful civil rights laws in American history."[3] In contrast, former California Congressman Tony Coelho, the primary author and sponsor of the ADA, believes "too many American businesses still fail to employ people with disabilities; too many people with disabilities are not integrated into their local communities, cannot participate in the everyday activities most Americans enjoy."[4]

To California employers who must comply with the ADA and its state counterpart, the Fair Employment and Housing Act (the FEHA),[5] the results are also mixed. After 16 years of applying the laws, many employers have successfully integrated their basic legal provisions into the fabric of the workplace. However, given legislative changes at the state level and ambiguity in both statutes, the laws represent an evolving set of obligations that generate uncertainty and legal pitfalls for employers.

This article attempts to clarify some of the confusion regarding the ADA and the FEHA by presenting a case study that addresses many of the difficult issues confronting employers and employees. The case study tracks the employment of a hypothetical employee, Tony, as he and his supervisor, Matt, navigate through legal issues that are often disputed in disability cases.

THE APPLICATION PROCESS

Tony submits a written application for an outside sales position at ACE Pharmaceuticals, a fictitious California corporation. The application form, which ACE has not updated since 1985, contains the question "Do you have any physical condition or handicap that limits your ability to perform the job for which you are applying, ___ yes ___ no?" Tony answers "no." Neither Tony nor Matt, who reviews the application, realizes that the question is impermissible under the ADA because it would likely elicit information about an applicant's disability.[6] ACE would later remove the question and replace it with the following permissible question: "Are you able to perform all of the functions listed on the job description that applies to this position?"

Matt, who has received employer training regarding the ADA and the FEHA, knows that he cannot ask questions during the interview that will elicit information regarding a disability, such as:

- Do you have a disability that will impact your performance?
- How many days of sick leave did you take last year?
- Did you make any workers' compensation claims on your previous job?

Instead, he asks Tony several probative but legal questions, such as how he would perform the essential functions of the job, whether he had ever been convicted of a felony, and how many days he had been absent at his previous job. Tony performs well during the interview and receives an offer from Matt, which he accepts.

DOES TONY HAVE A DISABILITY?

During his first six months of employment at ACE, Tony performs flawlessly and does not miss a day of work. Thereafter, Tony's attendance declines. He begins to miss work on a regular basis. During Tony's one-year evaluation conference, Matt tells Tony that although he has performed very well, his attendance has fallen to unacceptable levels. Tony replies that he feels overworked, unsupported, and extremely stressed out. The stress has become "uncontrollable," Tony explains, and has caused his attendance problems.

Following the conference, Matt considers the potential ADA/FEHA implications in Tony's statements. Matt does not believe that stress alone should constitute a disability, since all employees work with a certain degree of stress, but he is not sure. Matt does not know that courts have classified stress as a disability if it derives from an underlying medical or psychological condition.[7] Matt also has no knowledge that a federal district court recently rejected an employer's argument that the FEHA could not possibly apply to common temporary ailments such as colds, the flu, or workplace stress because then every citizen in California would be disabled under the law and the legislature could not have intended such an "absurd result."[8] The court, in perhaps an unintended dig at state lawmakers, stated "the mere fact that a statute is 'absurd' does not preclude a finding that it is what the Legislature intended . . . ."[9]

Although Matt does not think Tony's stress constitutes a disability, he knows that the FEHA has a broader definition of disability than the ADA. While FEHA only requires that a physical or mental condition "limit" a major life activity in order to be considered a covered disability, the ADA requires a "substantial limitation" of a major life activity.[10] Matt also knows that the FEHA determines disability without considering mitigating measures, such as medication or assistive

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Tzu Chuan Teng, a student at Santa Clara University School of Law, is the First Place Winner of the 2006 Competition for Outstanding Student Papers in the Area of Labor and Employment Law, a statewide competition sponsored by the Labor and Employment Law Section. This article is her winning entry.

Not Just a Matter of Chromosomes: A Comparison of Protections for Transgender Individuals under Title VII and the FEHA

By Tzu Chuan Teng

One of the most exciting developments in the area of employment law is the increasing protection for transgender individuals from workplace discrimination. Both federal and state laws have made advancements in recognizing the difference between sex and gender. They acknowledge that protection against sex discrimination alone does not adequately address the problem of widespread discrimination against transgender people.[1] Title VII of the Civil Rights Act of 1964 (Title VII)[2] and the Gender Non-Discrimination Act of 2003,[3] which amended California's Fair Employment and Housing Act (the FEHA)[4] to specifically include transgender individuals are among the sources of this increasing protection.[5] This essay examines the differences between these acts by focusing on two primary points of distinction: (1) how each expands its protection to include transsexual individuals; and (2) the specific grooming code protection offered by the FEHA.

I. HOW THE FEHA AND TITLE VII EXPANDED PROTECTION TO INCLUDE TRANSSEXUAL INDIVIDUALS

Although transgender individuals are finding increasing solace from provisions barring employment discrimination under both Title VII and the FEHA, those protections arise in dramatically different ways. Transgender individuals are explicitly included within the purview of the FEHA.[6] Amended by the 2003 Gender Non-Discrimination Act, the FEHA now specifically includes "gender" in its definition of "sex" and makes it unlawful for an employer to discriminate against an individual on the basis of gender.[7] CAL. GOV'T CODE § 12926(p) provides:

> (p) "Sex" includes, but is not limited to, pregnancy, childbirth, or medical conditions related to pregnancy or childbirth. *"Sex" also includes, but is not limited to, a person's gender, as defined in Section 422.56 of the Penal Code.* (Italics added to show amended language.)[8]

CAL. PEN. CODE § 422.56(c) defines "gender" as:

> "Gender" means sex, and includes a person's gender identity and gender related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth.[9]

This language explicitly recognizes gender discrimination as a distinct form of sex discrimination. The 2003 Amendments reflect the California Legislature's intent to specifically expand the prohibition on sexual discrimination by including gender in the definition of sex.[10] Therefore, under the FEHA, a transsexual individual who brings a gender discrimination claim is recognized as a member of a protected class under the law.[11]

Title VII, however, remains largely in its original form and does not recognize gender discrimination in its statutory language.[12] It provides, in relevant part, that "it shall be an unlawful employment practice for an employer …to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin."[13] Title VII has begun expanding its protections to include transgender individuals.[14] Unlike the legislative initiatives that broadened the FEHA,[15] the expansion under Title VII is the result of courts' evolving interpretations of the act to address societal needs.[16]

Until the past decade, courts held that transgender individuals had no recourse against employment discrimination under Title VII.[17] In *Ulane v. Eastern Airlines*, the employer discharged a transsexual employee, who ceased being male and became female.[18] While recognizing distinctions among homosexuals, transvestites, and transsexuals, the Court held that Title VII protections do not apply to transsexuals because "sex" must be narrowly construed to mean only anatomical and biological characteristics, and because Congress never intended Title VII to protect transsexuals.[19] For years, courts adhered to the holding in *Ulane*, and denied Title VII protection to transgender individuals.[20]

It was not until the U.S. Supreme Court issued its decision in *Price Waterhouse v. Hopkins*[21] that transsexuals began to gain protection under Title VII.[22] In *Price Waterhouse*, a female candidate was refused admission to partnership in her accounting firm because she was deemed too masculine.[23] She was told that her professional problems would be solved if she were to take "a course at charm school," "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[24] Writing for a plurality of the Court, Justice Brennan introduced the notion of "sex-stereotyping" as the basis for framing a sex discrimination claim under Title VII.[25] He reasoned that differential treatment of men and women resulting on account of non-adherence to sex-stereotypes may be considered sex discrimination for purposes of Title VII protection.[26] Since the Supreme Court's decision in *Price Waterhouse*, subsequent lower court decisions have expanded the Court's interpretation to include protection for transsexuals.[27]

The most notable case is *Smith v. City of Salem*, where the Sixth Circuit Court explicitly held that Title VII protection covers transgender individuals.[28] The plaintiff in *Smith* was born male, but identified himself as female.[29] When the plaintiff began to express a more feminine appearance at work, co-workers

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Introducing the Labor and Employment Law Section's NEW

Suzanne M. Ambrose is the Director of the Department of Fair Employment and Housing (DFEH). Governor Arnold Schwarzenegger appointed her in August 2004. Ambrose has had a long history with the DFEH. She has represented the DFEH in a variety of capacities throughout her career as a State attorney. In 1988, Ambrose joined the Department as a staff attorney in the Sacramento Legal Office. She was appointed Assistant Chief Counsel in 1994 and became the Department's Chief Counsel in 1997. She joined the Attorney General's Office in 2000 as a Deputy Attorney General in the Civil Rights Enforcement Section representing the Department and the Fair Employment and Housing Commission in matters referred to the Attorney General. In 2002, Ambrose was appointed the Supervising Deputy Attorney in the Civil Rights Enforcement Section of the Attorney General's Office. Ambrose's academic training began at the University of California, Berkeley where she received her B.A.in history and sociology in 1984. Ambrose interned with the DFEH as a law clerk while attending the University of the Pacific, McGeorge School of Law, where she earned her J.D. in 1987.

Barbara J. Chisholm is an attorney at Altshuler, Berzon, Nussbaum, Rubin and Demain, a litigation firm specializing in labor and employment, environmental, constitutional, campaign and election, and civil rights law. She represents labor unions and workers in arbitration, administrative proceedings and complex labor and employment cases in the state and federal court systems. Chisholm also regularly provides advice to unions on organizing campaigns, negotiations and grievance processing. She is a graduate of Swarthmore College and Howard University School of Law, where she was the Submissions and Symposium Editor of the Howard Law Journal. Chisholm served as a law clerk to Judge Emmet G. Sullivan of the U.S. District Court for the District of Columbia. She currently serves as a member of the Board of Directors of the AIDS Legal Referral Panel. Prior to law school, Chisholm worked in the Russian Far East for five years, where she was the founder and director of a non-profit organization working on environmental and human rights issues.

Henry J. Josefsberg is an attorney in solo practice in Long Beach. He represents employees and small companies in employment disputes. Josefsberg provides advice concerning employment matters such as wage and hour, discrimination, harassment, trade secrets, and other day-to-day issues concerning employment relationships. Part of his practice is devoted to providing mediation services, primarily to parties in employment-related disputes. Josefsberg has served as an expert witness as to legal and employment issues. He is a member of the Los Angeles County Bar Association and its Trial Practice Inn of Court as well as the Litigation and Labor & Employment Law Sections of the American Bar Association. Josefsberg has published articles on and has moderated and presented programs devoted to employment law. He is on the Mediator and Temporary Judge panels of the Los Angeles County Superior Court. Josefsberg received his undergraduate degree from the University of Wisconsin, Madison, and his law degree from the Washington University School of Law.

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Trudy M. Largent is the Vice Chancellor for Human Resources and Employee Relations, for the San Bernardino Community College District. The District, comprised of two colleges, employs 1,200 and serves 12,000 students. She has more than 16 years experience in Human Resources administration, labor and employment law, and has served as the chief human resources administrator for three California community college districts, north and south, advising governing boards, chancellors, presidents, supervisors and employees on all aspects of education, labor and employment law. Largent is the former general counsel for the American Association of University Administrators (AAUA). Before beginning a legal career, Largent became the first (and only) female police chief in the history of one Southern California community college district police department, and after law school went on to serve as its first in- house counsel. Largent is a principal in the consulting firm of Largent & Associates, located in Rancho Cucamonga, focusing on neutral fact-finding investigations and complaint resolution in the public sector, on matters involving harassment, discrimination, retaliation and police officer misconduct. Her diverse background in human resources administration, law enforcement, labor and employment law and her investigative skills has earned her the respect of both employees and employers. She is the author of *And It's Called Sexual Harassment*, a series of articles published in the California Association of College/University Police Chiefs' Campus Safety Journal, and the former contributing editor of the "Legal Corner" for the Communiqué, a quarterly publication of the American Association of University Administrators. Largent received her undergraduate degree in criminal justice from California State University, Los Angeles, and her law degree from Western State University, where she received the American Jurisprudence Award.

Emily Prescott is a Senior Labor Counsel with Renne Sloan Holtzman Sakai, LLP, where she practices labor and employment law on behalf of public sector employers. Her practice focuses on traditional labor relations, including collective bargaining, preventative counseling, and unfair labor practice charges. Prescott assists senior policy makers and elected officials in developing collective bargaining strategies and has successfully negotiated numerous collective bargaining agreements on behalf of cities and a community college district in both traditional and interest-based negotiating environments. Before joining her firm, Prescott was in private practice as a neutral labor arbitrator, hearing officer, and panel member of the California State Mediation and Conciliation Services. Prescott formerly served as a chief negotiator and labor relations representative for the City and County of San Francisco and organized and facilitated a pre-bargaining management retreat to develop bargaining policies for negotiations with the City's 50 labor unions. Prescott started her career as an attorney with the Oakland City Attorney's office. She serves as a pro bono arbitrator for the San Francisco Homeless Shelter Arbitration Project and has presented arbitration guidelines at a seminar to train new arbitrators. Prescott is a graduate of the University of California Hastings College of the Law and Duke University.

Congratulations to Winners of the 2006 Labor and Employment Law Section Student Writing Competition

- **First Place Winner:** Tzu Chuan Teng, Santa Clara University School of Law (article printed on page 5)
- **Second Place Winner:** Matthew Wood, Golden Gate University School of Law
- **Honorable Mentions:** Nikki Mozdyniewicz, University of the Pacific, McGeorge School of Law; Ben Johnson, UC Berkeley, Boalt Hall School of Law

A Tale of Two Cases: *Jenkins v. County of Riverside*

By Stewart Weinberg

Stewart Weinberg, a 1960 graduate of Boalt Hall, is a partner in Weinberg, Rogers and Rosenfeld in Oakland, a union-side labor firm. Mr. Weinberg specializes in the representation of unions and employees in the public sector.

While arguing a matter before a court, lawyers rarely give complete citations when they mention cases. Unless the California Supreme Court decides to de-publish the decision of a Fourth Appellate District decision in *Jenkins v. County of Riverside*, lawyers who casually refer to *Jenkins v. County of Riverside* in oral argument will probably get the following reaction from the court, "Which *Jenkins v. County of Riverside*, counsel?" As of this writing, there are two published decisions bearing that name, involving the same parties and the same facts, slightly different questions of law, and coming to totally opposite legal conclusions.

In the earlier federal case, involving a claim under 42 U.S.C. 1983, the Ninth Circuit held that the plaintiff was "qualified" for permanent status as a regular employee of the County of Riverside and that her Fifth and Fourteenth Amendment rights to property had been denied. Only a few months later the California Court of Appeal, relying on the same facts and cases, came to the conclusion that the plaintiff had been properly terminated as a temporary employee and that the Ninth Circuit was wrong, and collateral estoppel did not apply.[2] Public sector labor lawyers will be interested in these cases because of the impact on the question of whether a temporary employee has a legitimate claim to de facto status as a permanent employee. Lawyers, regardless of their areas of emphasis, will be fascinated by the conflict of laws issues.

THE FACTS

The County of Riverside hired Evelyn Jenkins in 1992 as a temporary employee with the job title of Office Assistant II. The County terminated her in May of 1998 shortly after returning from a worker's compensation injury, and, according to her, only six hours after turning in a doctor's report seeking accommodations for her injury. There is no dispute about the fact that she was terminated without prior notice, a statement of reasons, or a hearing. Thus began a lengthy and complicated period of litigation between Ms. Jenkins and the County of Riverside. This litigation is not quite on the level of *Jarndyce v. Jarndyce* in Dickens' *Bleak House*, but the parties and their lawyers probably feel that it is.

The County consistently asserted that it terminated Jenkins because she was a temporary employee, and that the County has a personnel rule (Ordinance Riverside No. 440) that provides that no temporary employee may be employed for more than 1040 hours per year (approximately six months). The County maintained that since she exceeded that hourly limit in the year she was terminated, Ordinance 440 mandated that action. The Fourth District Court of Appeal for the State of California accepted that as a legitimate basis for termination. Ironically, the Ninth Circuit relied on the fact that she had, over a period of five years of employment, consistently exceeded the 1040-hour limitation to hold that she was "qualified" for a regular position.

The County hired Jenkins in 1992 as an Office Assistant II, to assist at a County hospital in reducing the backlog of files. When she completed that task, she moved on to assist in the ongoing work of the Nursing Department. Over the next five years, Jenkins repeatedly took the written test for a regular position. The Ninth Circuit's opinion stated that she passed the examination four out of the seven times that she took it. The Fourth District Court of Appeal asserted that she passed it five out of the eight times that she took it. She attended many oral interviews following her successful written examinations, but was never selected for a permanent position. During her employment she received the same type of evaluations given to probationary employees and "consistently received exemplary performance reviews."

In April of 1999, eleven months after her termination, Jenkins filed a claim with the California Department of Fair Employment and Housing, asserting disability discrimination and failure to accommodate her disability. On July 2, 1999, she filed an amended complaint against the County of Riverside in the United States District Court alleging a civil rights violation under 42 U.S.C. 1983. The County of Riverside won summary judgment in June of 2000, but in January of 2002 the Ninth Circuit reversed, holding that plaintiff had not been afforded a proper opportunity to oppose the motion for summary judgment. The Court of Appeal remanded the case back to the District Court to determine whether or not Jenkins was "qualified" for regular employment by the County of Riverside. This decision has been referred to as "*Jenkins I*."

In June of 2002, plaintiff filed a state court complaint, which was later amended in July of 2002. In this new state court action she alleged: (1) violation of the Meyers-Milias-Brown Act for failing to compensate her as a regular employee; (2) violation of the County salary ordinance by treating and classifying her as a temporary employee; (3) violation of the Fair Employment and Housing Act (FEHA) by terminating her because of her disability and failing to offer her reasonable accommodations; and (4) violation of her rights by failing to enroll her in the Public Employees Retirement System as a regular employee.

While these state causes of action were pending, plaintiff and the County filed cross-motions for summary judgment in the remanded federal case. The District Court granted summary judgment to the County and plaintiff filed her second appeal to the Ninth Circuit. In "*Jenkins II*" the Ninth Circuit held in an unpublished per curiam decision in December of 2004 that its earlier decision was "law of the case" and the only issue

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Anthony J. Oncidi is a partner in and the Chair of the Labor and Employment Department of Proskauer Rose LLP in Los Angeles, where he exclusively represents employers and management in all areas of employment and labor law. His telephone number is 310.284.5690 and his email address is aoncidi@proskauer.com.

Employment Law Case Notes

By Anthony J. Oncidi

Employee Hired For One Day Was Entitled To Immediate Payment Of Wages

Smith v. Superior Court (L'Oréal USA, Inc.), 39 Cal. 4th 77 (2006)

Aspiring actress and model, Amanza Smith, worked as a "hair model" for L'Oréal at Christophe hair salon for which she was paid $500 for one day's work. L'Oréal considered Smith to be an independent contractor and took more than two months to pay her the compensation it owed to her. Smith filed a class action on behalf of herself and other similarly-situated hair models, alleging, among other things, violation of CAL. LAB. CODE § 201 (requiring immediate payment of wages earned upon discharge of an employee) and seeking waiting-time penalties under section 203 in the amount of $500 per day per hair model for 30 days based on the late-payment of compensation. The trial court agreed with L'Oréal that the word "discharge" as used in CAL. LAB. CODE § 201 means "the affirmative dismissal of an employee by an employer from ongoing employment and does not include the completion of a set period of employment or a specified task" and granted summary adjudication in L'Oréal's favor. Although the Court of Appeal denied Smith's petition for a writ of mandate, the California Supreme Court reversed, holding that when an employee is released after completing a specific job assignment or time duration for which the employee was hired, he or she is entitled to immediate payment of the earned wages. *Cf. Marathon Entm't, Inc. v. Blasi*, 140 Cal. App. 4th 1001 (2006) (actor's personal manager could be entitled to commission for procuring employment for actor despite not being licensed as a talent agency).

"At Will" Language Permitted Employer to Terminate Without Cause

Dore v. Arnold Worldwide, Inc., 39 Cal. 4th 384 (2006)

Brook Dore signed an employment letter with an at-will provision, which defined "at will" as the right to terminate the employment "at any time." Reversing the decision for Dore, the California Supreme Court disagreed with the argument that the verbal formulation "at any time" in the termination clause of an employment contract was *per se* ambiguous merely because it did not expressly speak to whether cause was required, because such a formulation ordinarily entailed the notion of "with or without cause." The letter was further unambiguous, despite its failure to state whether cause was required. It plainly stated that employment "at will," which when used in an employment contract, normally conveyed an intent that employment could be ended by either party at any time without cause. As a result, there were no triable issues of fact as to breach of contract and the implied covenant of good faith and fair dealing. The employer was also entitled to summary judgment as to promissory fraud because the employee produced insufficient evidence of reliance.

Maintenance Mechanic May Have Been Subjected To Same-Gender Sexual Harassment

Singleton v. United States Gypsum Co., 140 Cal. App. 4th 1547 (2006)

John Singleton, a maintenance mechanic employed by USG, was, according to the employer, terminated for having said words to the effect of "if we [have to] work on Christmas, I am going to come in here with a gun and shoot everybody except Sandy." Singleton denied making the statement though he admitted to being angry about possibly having to work on Christmas and saying, "Now I know why some people go postal." In his lawsuit, alleging sexual harassment and unlawful retaliation, among other things, Singleton asserted that prior to his termination he was subjected to harassing comments from two of his male coworkers who called him names (e.g., "Sing-a-ling") and who talked about his performing oral sex on them and their engaging in anal sex with him. Singleton further testified that his supervisors ignored his complaints about these statements that made his employment a "living hell." The Court of Appeal reversed the summary judgment that had been entered in favor of the employer, concluding there was sufficient evidence to create a triable issue of material fact. *See also Burlington Northern & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405 (2006) (reassignment of female employee's duties and suspension without pay—followed by reinstatement and provision of backpay—constituted retaliation in violation of Title VII); *Blum v. Superior Court*, 141 Cal. App. 4th 418 (2006) (employee's attorney—instead of employee himself—may verify DFEH complaint).

Company's Out-of-State Employees May Have Violated California Privacy Law With Surreptitious Taping

Kearney v. Salomon Smith Barney, Inc., 39 Cal. 4th 95 (2006)

In this proceeding, several California clients of SSB filed a putative class action seeking damages and injunctive relief against SSB's Atlanta-based branch's practice of recording telephone conversations with California residents without their knowledge or consent. The lower court affirmed dismissal of the lawsuit after applying the law of the State of Georgia. The California Supreme Court, however, concluded that the failure to

apply California law in this context would impair California's interest in protecting the degree of privacy afforded to California residents by California law. Further, the Supreme Court concluded that applying Georgia law in this instance would place California businesses (that are subject to California's privacy law) at an unfair disadvantage vis-à-vis their out-of-state competitors. The Court also concluded that the action could go forward insofar as plaintiffs sought injunctive relief but not damages or restitution based on SSB's past conduct.

Release Agreement May Not Have Barred Later Discrimination Claims

Butler v. The Vons Companies, Inc., 140 Cal. App. 4th 943 (2006)

While working as a stock clerk for Vons, Sheldon Butler signed a "Compromise and Release Settlement Agreement" arising from an altercation that Butler had with a co-employee. Approximately two years later, Butler filed unrelated claims alleging employment discrimination and violation of CAL. BUS. & PROF. CODE § 17200, and Vons sought to rely upon the Release to bar Butler's claims. The trial court granted Vons' motion for summary judgment, but the Court of Appeal reversed, holding that the scope of the waiver contained in the Release was ambiguous. The "principal source of ambiguity" was that there were three parties to the Release—Vons, Butler and Butler's union. (The reason for the union's participation was that the union had filed, pursued and resolved the grievance that arose from the altercation that was the subject of the initial dispute.) The Court concluded "as a broad general proposition, it does not necessarily follow that the settlement of a labor grievance between a union and an employer is intended to extend to personal claims of the employee." *Cf. California for Disability Rights v. Mervyn's, LLC*, 39 Cal. 4th 223 (2006) (Proposition 64 amendments to the Unfair Competition Law apply to pending cases).

Epileptic Heavy-Equipment Operator May Have Been Discriminated Against On Basis Of Disability

Dark v. Curry County, 451 F.3d 1078 (9th Cir. 2006)

Robert Dark, an epileptic since the age of 16, worked as a maintenance and construction worker for Curry County, Oregon for approximately 16 years. Among other things, Dark operated heavy equipment such as construction vehicles for the County. On the morning of January 15, 2002, Dark experienced an "aura" (a "nervous jerk") that signaled to Dark he might have a seizure that day—approximately half of the time after experiencing an aura, Dark would have a seizure. Despite this warning, Dark reported for work as scheduled and failed to inform anyone of the possibility of his suffering an epileptic seizure. Later that day, Dark suffered a seizure and fell unconscious while driving a County pickup truck. Dark's passenger, another County employee, was able to gain control of the truck before anyone was injured. Following a disciplinary hearing, Dark's employment was terminated on the ground that he could not perform the essential functions of his position and that his continued employment posed a threat to the safety of others.

Dark filed a lawsuit under the Americans with Disabilities Act (ADA), alleging discrimination on the basis of a disability. The district court granted the County's motion for summary judgment, but the Court of Appeals reversed after observing that the County had offered "two divergent explanations" for Dark's termination: (1) inability to perform the essential functions of the job and (2) misconduct associated with operating the truck in total disregard of the safety of himself and others. The Court concluded the "summary judgment record is replete with evidence suggesting that 'misconduct' was a pretext for discrimination on the basis of a disability" and that a genuine issue of material fact existed as to whether a reasonable accommodation could have been provided to Dark. *Cf. Teichert Constr. v. Cal-OSHA*, 140 Cal. App. 4th 883 (2006) (Cal-OSHA regulation requiring hauling and earth moving operations to "be controlled" was not unreasonably vague).

Action Filed Against Former Employer's Attorneys Was Not Subject To Dismissal Under Anti-SLAPP Statute

Soukup v. Law Offices of Herbert Hafif, 39 Cal. 4th 260 (2006)

Peggy Soukup, a former employee of the Law Offices of Herbert Hafif, sued Ronald C. Stock for abuse of process and malicious prosecution based upon Stock's prosecution of an earlier lawsuit against Soukup on behalf of the Hafifs and their law firm. The underlying lawsuit, which involved Soukup's alleged disclosure to a third party of confidential information that Soukup obtained during her employment with the Hafifs, was itself dismissed in response to Soukup's special motion to strike under the anti-SLAPP provisions of CAL. CODE CIV. PROC. Although the trial court denied Stock's special motion to strike the malicious prosecution lawsuit, the Court of Appeal reversed, holding that the later action arose out of Stock's exercise of his free expression rights on behalf of his clients, the Hafifs. However, the California Supreme Court reversed the Court of Appeal, holding that Soukup had demonstrated a probability of prevailing on her malicious prosecution action. *Cf. Flatley v. Mauro*, 39 Cal. 4th 299 (2006) (attorney's letter and telephone calls to prominent entertainer demanding $1 million in exchange for not publicly accusing him of rape constituted civil extortion and was not protected activity under anti-SLAPP statute).

WARN Act Does Not Apply To Government-Compelled Layoff

Deveraturda v. Globe Aviation Sec. Services, 454 F.3d 1043 (9th Cir. 2006)

Virgil Deveraturda and other similarly situated employees, who were employed by Globe Airport Security Services to provide screening services at San Jose International Airport, were laid off as a result of the Aviation and Transportation Security Act of 2001. The employees were not given the 60 days' notice provided under the WARN Act. The Ninth Circuit held the WARN Act did not apply because the layoff resulted from the government's decision after September 11, 2001, to federalize airport security, a decision over which Globe had no control.

LABOR COMMISSIONER OPINION LETTER

(posted at www.dir.ca.gov/dlse/DLSE_OpinionLetters.htm)

Employer may satisfy its obligation to provide employees with a "wage statement" pursuant to CAL. LAB. CODE § 226(a) by providing an electronic rather than a "hard copy" version of the record if the employee so elects. (Opinion Letter 2006.07.06).

NLRA Case Notes

By Emma Leheny

Emma Leheny is a partner in Rothner, Segall & Segall in Pasadena, where she represents unions and employees in labor and employment matters.

California Supreme Court to Decide Whether Shopping Mall May Lawfully Ban Handbillers from Advocating a Boycott of One of the Mall's Tenants

Fashion Valley Mall v. NLRB, 451 F.3d 241 (D.C. Cir. 2006)

This case arose out of a dispute between the Graphic Communications International Union and the San Diego Union-Tribune newspaper. Members and supporters of the union handbilled customers of a Robinsons-May store, a tenant in a shopping mall located near the newspaper's office and a regular advertiser in the newspaper, to protest actions by the newspaper. The mall's regulations allowed expressive activity on the mall premises, but required a permit and an agreement that individuals or organizations abide by all mall regulations, including one prohibiting the "urging or encouraging, in any manner, customers not to purchase the merchandise or services offered by any one or more of the stores or merchants in the shopping center." After a representative of the mall asked the handbillers to leave and informed them that they would have to apply for a permit, the union filed an Unfair Practice Charge, alleging that the mall unlawfully maintained and enforced a rule that interfered with employees' Section 7 rights to engage in protected concerted activity.

The ALJ held that the mall violated Section 8(a)(1) and the Board affirmed, holding the mall could neither maintain nor enforce a requirement that individuals or organizations foreswear an otherwise lawful boycott of a mall tenant in order to obtain permission to handbill on the mall's premises. The Board noted that California law permits the exercise of speech and petitioning in private shopping centers, subject to reasonable time, place and manner restrictions. It reasoned that, because the exclusion of speech advocating a consumer boycott was a content-based restriction, rather than a reasonable time, place or manner regulation, the employer had violated 8(a)(1) by maintaining such a rule. The Board also held that the mall had unlawfully interfered with employees' Section 7 rights by enforcing this policy when its representative asked the union's handbillers to leave and made their continued handbilling activities conditional upon a permit and a promise to adhere to the rule excluding advocacy of a consumer boycott. The mall appealed the Board's decision, arguing that it was not a public forum in which the constitutional rights to speech and petition are protected, and that state law does permit an employer to exclude protesters under these circumstances, since urging a boycott would defeat the "primary purpose" of the mall itself, which is to further commercial activity. The Board cross-appealed for enforcement of its order.

In an unanimous opinion, the D.C. Circuit Court of Appeals agreed with the Board's reasoning that state law would be controlling in this case, but the Court took no position on whether state law permits the exclusion from shopping malls of individuals or groups urging an otherwise lawful consumer boycott. Instead, finding no case law directly on point, it certified the question for the California Supreme Court to decide whether, under California law, the mall could maintain and enforce its rule against the handbillers.

In a concurring opinion, Senior Circuit Judge Williams wrote separately to emphasize the limited reach of the holding. He observed, *inter alia*, that because the mall had not raised it as a defense, this case did not decide whether a firm that is connected to a labor dispute or has a relationship with an employer involved in a labor dispute, but is not itself a party to the dispute, as was the case with Robinsons-May in this case, was subject to the same duties as the employer who was a direct participant in the dispute.

Airport Screeners Have Right to Organize Where Employed by Private Contractor

Firstline Transportation Security, Inc., 347 NLRB No. 40 (June 28, 2006)

In this case, the Board ruled that privately employed screeners at Kansas City International ("KCI") Airport have the right to organize. The employer, Firstline Transportation Security, Inc., contracts with the federal Transportation Security Administration ("TSA") to provide passenger and baggage screening services at KCI. The Security, Police, and Fire Professionals of America petitioned to represent the screeners, but Firstline took the position that collective bargaining by screeners was prohibited under the federal Aviation and Transportation Security Act ("ATSA"), Pub. L. No. 107-71, 115 Stat 635 (2001) (codified as amended in scattered sections of 5, 26, 31, and 49 U.S.C.). The Board, however, concluded that it was not statutorily barred from asserting jurisdiction over Firstline.

The stated purpose of the ATSA, enacted in response to the events of September 11, 2001, is to improve aviation security. Under the ATSA, screening services are provided directly by federal TSA employees except where the TSA contracts with private companies to provide these services. The ATSA is silent as to the collective bargaining rights of employees, but vests the TSA Under Secretary with the authority "to fix the compensation, terms, and conditions of employment of Federal service." (49 U.S.C. § 44935 Note.) Pursuant to that authority, TSA's Under Secretary issued a memorandum on January 8, 2003 stating that TSA security screeners were prohibited from engaging in collective bargaining. The Federal Labor Relations Authority subsequently upheld that determination.

Firstline contended that the Under Secretary's memorandum applied to both privately and federally employed screen-

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ers, but the Board disagreed. The Under Secretary's authority in issuing the memorandum was limited by section 44935 of the ATSA to setting the employment terms of those in "federal service." In fact, TSA adopted the same interpretation, filing a statement with the Board that ATSA "does not prohibit privately-employed screeners from engaging in collective bargaining." By contrast, the Board found that the exclusion from the right to strike found in section 44935(i) of the ATSA did explicitly extend to both federally and privately employed screeners.

The employer's alternate argument—that the Board should decline to assert jurisdiction in the interest of national security—was also rejected. After surveying a range of Supreme Court and Board decisions dating back to World War II, the Board concluded that "prudence cautions against crafting . . . a broad and ill-defined national security exception to the Board's jurisdiction."

Employer May Withdraw Recognition after Certification Year Expires, Even When Evidence of Loss of Majority is Based on Petition Generated During Certification Year

Machinists Dist. Lodge No. 190, Local Lodge 1584, Int'l Ass'n of Machinists and Aerospace Workers, AFL-CIO v. NLRB, 2006 U.S. App. LEXIS 14950 (9th Cir. 2006)

This case further refines the contours of the "certification year," the well-settled Board precedent whereby a union recognized as the exclusive representative of an appropriate bargaining unit (whether through an NLRB-supervised representation election or through card check/voluntary recognition by the employer) enjoys a one-year irrebuttable presumption of majority support among bargaining unit members. Within this one-year "safe harbor," neither the employees nor the employer may file a petition with the Board to decertify the exclusive representative, nor may the employer withdraw recognition, even when it entertains a good faith doubt as to whether the union continues to enjoy majority support.

In this case, the employer withdrew recognition of the union shortly after the expiration of the certification year after receiving a petition in which a majority of employees indicated they no longer wished to have the union represent them. Most of the petition signatures were gathered during the certification year, albeit on the final day before the certification year expired. The union filed an Unfair Practice Charge, arguing that because the signatures relied on by the employer were collected during the certification year, the employer's withdrawal of recognition was an unlawful refusal to bargain. Alternatively, the union argued that the petition was tainted because it was circulated only two weeks after the employer had unilaterally changed its attendance policy, since Board precedent also requires that any doubt of majority support for an incumbent union "must be raised in a context free of Unfair Labor Practices of the sort likely, under all the circumstances, to affect the union's status, cause employee disaffection, or improperly affect the bargaining relationship itself."

The Board rejected both of the union's arguments. It reasoned that although the employees' signatures were gathered within the final hours of the certification year, the petition itself was not presented to the employer until after the close of the certification year and thus, the employer was within its rights to withdraw recognition. It further held that, although the employer had unlawfully refused to bargain when it unilaterally implemented an attendance policy, this fact alone did not necessarily taint the employee petition. Relying on a four-factor test previously set forth in Master Slack Corp., 271 NLRB 78 (2000), the Board found no causal relationship between the employer's unlawful posting of a new attendance policy and the circulation of an employee petition requesting that the employer withdraw recognition from the exclusive representative.

In a sparsely worded decision, a panel for the Ninth Circuit Court of Appeals consisting of Circuit Court Judges Rymer and Wardlaw and District Court Judge Selna unanimously affirmed the Board's decision, holding that its findings of fact were supported by substantial evidence and that its interpretation of the Act was neither irrational nor arbitrary.

Board Finds Special Circumstances Justify Ban Against Nurses Wearing Buttons Outside of Immediate Patient Care Areas

Sacred Heart Medical Center, 347 NLRB No. 48 (June 30, 2006)

The employer in this case, an acute care medical center in Spokane, Washington, prohibited employees from wearing union buttons stating that "RNs Demand Safe Staffing" in areas where employees might encounter patients or patients' families. The ALJ found that the employer violated Section 8(a)(1) by promulgating and enforcing this policy, but the Board reversed and dismissed the complaint.

Nurses began wearing the buttons in the fall of 2003, at the commencement of contract negotiations (in which staffing levels were a subject of bargaining). Several months later, in February 2004, the employer issued the challenged prohibition. In the interim, there had been no complaints that the buttons disturbed patients or their families.

The Board acknowledged that restrictions on wearing union buttons that apply beyond the immediate patient care areas of healthcare facilities are presumptively invalid, citing *Casa San Miguel*, 320 NLRB 534 (1995). However, the Board found that here, the employer had demonstrated "special circumstances" to justify the restriction. Although there was no evidence of actual disturbance, the Board found that the buttons sent "a clear message to patients that their care is currently in jeopardy." Moreover, the Board considered the testimony of the nurses' supervisors, who voiced concern over the potential impact of the buttons on patients. The Board held that a healthcare facility "need not wait for the awful moment when patients or family are disturbed by a button before it may be lawfully restricted."

Member Liebman dissented, stating that the Board's finding of "special circumstances" rested on "mere speculation." In Member Liebman's view, the Board's decision in *Mt. Clemens Gen'l Hosp.*, 335 NLRB 48 (2001), was controlling. In that case, nurses wore buttons depicting the letters "FOT" with a line drawn through them, symbolizing the nurses' opposition to forced overtime. The employer banned the wearing of the buttons throughout the facility and the Board concluded that no "special circumstances" existed to support the ban because: (1) no patients complained about the buttons; and (2) the employer enforced the policy inconsistently. Here, Member Liebman pointed to the fact that no patient complaints had been lodged

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Wage and Hour Case Notes

By Donna Ryu, Sarah Beard & Matthew Goldberg

Prof. Donna Ryu (left) serves on the clinical faculty of the University of California, Hastings College of the Law. Sarah Beard (middle) is an associate with Siegel and LeWitter, a plaintiff's labor and employment firm in Oakland. Matthew Goldberg (right) is a Staff Attorney at the Legal Aid Society - Employment Law Center, where he directs the Wage Claims Project.

Waiting Time Penalties Apply to Employees' Release Upon Completion of Job Assignment or Time Duration

Smith v. Superior Court, 39 Cal.4th 77 (2006)

Plaintiff Amanza Smith worked for L'Oreal USA, Inc. as a hair model for one day for an agreed upon wage of $500. Smith performed the day of work as required, but did not receive her wages until more than two months later. She brought suit seeking, among other remedies, penalties pursuant to CAL. LAB. CODE §§ 201 and 203. Section 201 mandates employers to pay employees all wages earned and unpaid immediately upon "discharge." Section 203 establishes a penalty, commonly referred to as a waiting time penalty, for employers who willfully fail to comply with Section 201's mandate that final wages be paid immediately to discharged employees.

Defendant successfully moved for summary adjudication of the claim, contending that Smith could not recover Section 203 penalties because the job termination that occurred following her one day of work did not constitute a "discharge" (or "layoff") within the meaning of Section 201 and thus did not trigger its immediate payment requirement.

The Court of Appeal denied plaintiff's petition for writ of mandate, interpreting the discharge element of Section 201 to mean an employer must affirmatively dismiss an employee from an ongoing employment relationship.

The California Supreme Court reversed. In interpreting the statute, the Court invoked the longstanding public policy in favor of full and prompt payment of an employee's earned wages. The Court reviewed the legislative history as well as the legislative scheme as a whole, in order to ascertain the Legislature's intent and effectuate the purpose of the statute. Ultimately, the Court was persuaded that "an employer effectuates a discharge within the contemplation of sections 201 and 203, not only when it fires an employee, but also when it releases an employee upon the employee's completion of the particular job assignment or time duration for which he or she was hired."

Health Care Industry Workers On An Alternative Workweek Schedule Are Only Entitled to Overtime When They Work More Than 40 Hours in a Workweek

Singh v. Superior Court (UHS of Delaware, Inc.), 140 Cal. App. 4th 387 (2006), *review denied*, September 13, 2006, S145234.

Plaintiff, a registered nurse who worked an alternative workweek schedule of three 12-hour days, sought overtime pay for all hours worked beyond his regularly scheduled alternative workweek. He argued that the general overtime provision under Section 3(B)(1) of Wage Order No. 5-2001 mandates time-and-a-half pay for every hour worked beyond the regularly scheduled alternative workweek schedule, including hours 37 to 40. The employer, a hospital, argued that Section 3(B)(8) of the Wage Order, which applies specifically to health care employees on a 3/12 alternative workweek schedule, entitles health care employees to overtime pay only after performing 40 hours of work in the workweek.

The Court of Appeal agreed with the employer, noting that in promulgating Wage Order No. 5, the Industrial Welfare Commission elected not to consider a proposal to adopt premium pay for hours 37 to 40 in a 3/12 alternative workweek. The Court held that the plain language of Wage Order No. 5 makes clear that Section 3(B)(8) controls overtime pay for health care employees working the 3/12 alternative workweek schedule, and governed over the more general provisions of Section 3(B)(1) regarding alternative workweek schedules. Accordingly, health care employees are entitled to time-and-a-half pay only when they work more than 40 hours in a workweek under a 3/12 alternative workweek schedule.

IWC Exceeded Its Authority In Creating Meal Period Exemption

Bearden v. U.S. Borax, Inc., 138 Cal. App. 4th 429 (2006)

Plaintiffs worked 12.5 hour shifts in defendant's mine operations, but were given only one 30-minute meal break per shift. Plaintiffs brought suit for denial of meal and rest periods mandated by CAL. LAB. CODE §§ 226.7 and 512(a), and by Industrial Welfare Commission Wage Order No. 16-2001, which regulates certain on-site occupations in the mining industry. Defendant successfully demurred, arguing that an exception in the Wage Order relieved it of the obligation to provide a second meal break to employees governed by a collective bargaining agreement. In the alternative, defendant argued that the claims were subject to mandatory arbitration.

The Court of Appeal held that the IWC had exceeded its authority when it created the exemption from meal period requirements in Section 10(E) of Wage Order No. 16, which covers employees governed by certain collective bargaining agreements. The Court reasoned that the quasi-legislative Wage Order exemption went beyond the two existing exemptions expressly set forth in CAL. LAB. CODE § 512.

The Court also rejected defendant's argument that the claims were subject to mandatory arbitration pursuant to Wage Order Section 10(F), which applies to "cases where a valid collective bargaining agreement provides [a] final and binding mechanism for resolving disputes regarding enforcement of the meal period provisions." The Court held that plaintiffs' claims were based on minimum statutory labor standards, and that the union agreement therefore did not provide a "final and binding mechanism" on the issue.

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Public Sector Case Notes

By Stewart Weinberg

Stewart Weinberg, a 1960 graduate of Boalt Hall, is a partner in Weinberg, Rogers and Rosenfeld in Oakland, a union-side labor firm. Mr. Weinberg specializes in the representation of unions and employees in the public sector.

PUBLIC SECTOR ARBITRATION

Arbitrators May Interpret Statutes When Resolving Disputes Under Public Sector Collective Bargaining Agreement

California Correctional Peace Officers Association v. State of California, 47 Cal. Rptr. 3d 717 (2006)

The California Correctional Peace Officers Association, which represents both rank and file officers and their supervisors, has a memorandum of understanding (MOU) which provides that after the MOU has been executed, should the State elect to make changes in working conditions of correctional officers with respect to matters not expressly covered in the MOU, the parties shall negotiate the impact of those changes if the changes affect the working conditions of a significant number of employees or the subject matter of the changes is within the scope of representation. For years the parties had agreed that supervisory workers could sit in on rank and file negotiations as observers, and that rank and file bargaining unit members could observe negotiations of supervisory bargaining unit members. However, the State deemed that rank and file observers had disrupted supervisory negotiations, and the Department of Corrections declared that it would no longer permit supervisory bargaining unit members to observe negotiations of the rank and file MOU and that rank and file bargaining unit members could no longer observe supervisory negotiations. The Union filed a grievance alleging a violation of the language of the contract paraphrased above.

The State refused to arbitrate and the Union filed a petition to compel arbitration. The State's opposition to the petition was premised upon CAL. GOV'T CODE § 3529(c), subdivision (c) which states in part that excluded employees (in this case supervisors) shall not participate in meet and confer sessions on behalf of non excluded employees (in this case rank and file employees) and that "non excluded employees shall not participate in meet and confer sessions on behalf of supervisory employees." The Department of Corrections argued that that language superseded any inconsistent language in the MOU and that Courts have exclusive power to interpret and apply state statutes. It also argued that the MOU did not require arbitration of this particular dispute. The trial court denied the petition to compel arbitration but the Court of Appeal reversed and remanded the matter to arbitration. It held that arbitration was the preferred means of resolving disputes and that the State's arguments, in effect, were essentially that the grievance was unmeritorious, which is not a basis for denying arbitration. It also held that there was nothing in the arbitration clause of the MOU that required a topic to be expressly mentioned in the memorandum of understanding in order to qualify for arbitration. The arbitration clause broadly permitted arbitration of grievances which involve the interpretation, application or enforcement of the MOU. As to the issue of the exclusive authority of a court to interpret statutes, the court found no authority upholding that position. Rather, it cited a multitude of state and federal cases in which arbitrators were required to engage in statutory interpretation.

COUNTY EMPLOYEES RETIREMENT LAW OF 1937

Once Retired, Even On A Deferred Retirement, Employee Can Make No Further Elections Regarding Retirement Status

Bonner v. County of San Diego, 139 Cal. App. 4th 1336 (2006)

County probation officers employed in a county subject to the County Employees Retirement Law of 1937 (CAL. GOV'T CODE § 31450 *et seq.*) left County employment prior to January 1, 1999, and elected deferred retirement. Renegotiation of the collective bargaining agreement between the County and the Union that represents probation officers resulted in probation officers becoming safety members of the retirement system after January 1, 1999. The retired former probation officers sued the County in order to become entitled to safety member status. The court held that, once an employee retires, even on a deferred retirement, that employee does not have the right to make any further elections which may thereafter be afforded to County employees.

An Employee Who Has Not Been Dismissed Is Not Entitled To Back Pay When Denied Disability Retirement

Stephens v. County of Tulare, 38 Cal.4th 793 (2006)

California Government Code section 31725 provides that an employee who is terminated for disability and who is subsequently denied disability retirement is entitled to back pay and benefits. In the instant case the County showed a willingness to accommodate the employee's thumb injury. When the employee continued to complain about pain, the County placed him on sick leave status, giving him the right to return when he improved. The employee's application for disability retirement was denied. The employee then applied to the County for back pay and benefits, which the County denied. The Supreme Court of California held, since the employee had not been formally terminated, the employee was not entitled to back pay.

A Disabled Employee's Removal From Regular Employment Status Does Not Qualify As a Dismissal For Purposes Of Government Code Section 31725

Kelly v. County of Los Angeles, 141 Cal. App. 4th 910 (2006)

This case came quickly after the Supreme Court's decision in the Stephens case (above). Petitioner was a licensed

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Cases Pending Before the California Supreme Court

By Phyllis W. Cheng

Phyllis W. Cheng is a senior appellate court attorney in Division Seven of the Second District Court of Appeal, an editorial board member of this law review, and a former vice chair of the Fair Employment and Housing Commission.

Adams v. Los Angeles Unified School District, decision without published opinion, *review granted,* 2004 Cal. LEXIS 11343 (2004). S127961/B159310. Petition for review after affirmance of judgment. (1) Prior to its amendment by Statutes 2003, chapter 671, did the Fair Employment and Housing Act (CAL. GOV'T CODE § 12900 et seq.) impose a duty on an employer to take reasonable steps to prevent hostile environment sexual harassment of an employee by a client with whom the employee is required to interact? (2) If not, did the Legislature intend the 2003 amendment to apply retroactively to incidents that occurred prior to the effective date of the amendment? (3) If so, would application of the 2003 amendment to such cases violate the due process clause of the state or federal Constitution?

Atwater Elem. School District v. Dept. of General Services, 116 Cal. App. 4th 844 (2004), *review granted,* 13 Cal. Rptr. 3d 534 (2004). S124188/F043009. Petition for review after the reversal in judgment in action for writ of administrative mandate. Can a school district ever suspend or dismiss a credentialed teacher based on matters occurring more than four years before issuance of the notice of intention to impose such discipline (for example, under an equitable tolling or delayed discovery theory), or does CAL. ED. CODE § 44944(a) absolutely ban reliance on such evidence? (Cf. CAL. ED. CODE § 44242.7(a).) Fully briefed.

Consulting Engineers & Land Surveyors v. Professional Engineers in California Government, 140 Cal. App. 4th 46 (2006). S145341/C048282. Petition for review after affirmance of petition for writ of mandate. Did a collective bargaining agreement between the state and a union of state engineers, which required the state to use state engineers on public works projects before using private engineers to 'ensure that [state] employees have preference over contract employees,' violate article XXII of the state Constitution, added by Proposition 35 (General Elec. (Nov. 7, 2000)), which provides that state entities "shall be allowed" to contract with private architectural and engineering firms for services on public works and that nothing in the Constitution shall be construed to 'limit, restrict or prohibit' them from doing so?

Doe v. City of Los Angeles, 137 Cal. App. 4th 438 (2006), *review granted,* 2006 Cal. LEXIS 7583 (2006). S142546/B178689. Petition for review after affirmance of judgment. Were plaintiffs' claims against the City of Los Angeles and the Boy Scouts of America for sexual abuse by a city police officer while they participated in police department programs in the 1970s barred by the statute of limitations, or did plaintiffs sufficiently invoke the provisions of CAL. CODE CIV. PROC, § 340.1(b)(2), which permits the revival of certain claims of sexual abuse that would otherwise be barred where the defendant "knew or had reason to know, or was otherwise on notice, of any unlawful sexual conduct by an employee, volunteer, representative, or agent, and failed to take reasonable steps, and to implement reasonable safeguards, to avoid acts of unlawful sexual conduct in the future by that person"?

Gattuso v. Harte-Hanks, 133 Cal. App. 4th 985 (2005), *review granted,* 2006 Cal. LEXIS 2545 (2006). S139555/B172647. Petition for review after affirmance of order denying class certification. May an employer comply with its duty under CAL. LAB. CODE § 2802 to indemnify its employees for expenses they necessarily incur in the discharge of their duties by paying the employees increased wages or commissions instead of reimbursing them for their actual expenses? Fully briefed.

Gentry v. Superior Court, 135 Cal. App. 4th 944 (2006), *review granted,* 2006 Cal. LEXIS 5122 (2006). S141502/B169805. Petition for review after denial of peremptory writ of mandate. What is the enforceability of an arbitration provision that prohibits employee class actions in litigation concerning alleged violations of California's wage and hour laws?

Green v. State of California, 132 Cal. App. 4th 97 (2005), *review granted,* 2005 Cal. LEXIS 12602 (2005). S137770/E034568. Petition for review after affirmance in part and reversal in part of judgment. In order to establish a prima facie case under the Fair Employment and Housing Act (CAL. GOV'T CODE § 12900 et seq.) for discrimination in employment based on disability, does the plaintiff bear the burden of proving that he or she is capable of performing the essential duties of the job or does the employer have the burden of proving that the plaintiff was not capable of performing those duties? Fully briefed.

Harron v. Bonilla, 125 Cal. App. 4th 738 (2005), *review granted,* 2005 Cal. LEXIS 4585 (2005). S131552/D042903. Petition for review after affirmance of judgment. When a plaintiff files a cause of action based upon illegal conduct (e.g., extortion) allegedly engaged in by the defendant in relation to prior litigation, is the plaintiff's action subject to a special motion to strike under the anti-SLAPP statute (CAL. CODE CIV. PROC., § 425.16)?

International Federation of Professional Engineers v. Superior Court (*Conta Costa Newspapers*) 128 Cal. App. 4th 586 (2005), *review granted*, 32 Cal. Rptr. 3d 1 (2005). S134253/A108488. Petition for review after denial of writ of mandate. (1) Are the names and salaries of public employees who earn more than $100,000 per year exempt from disclosure under the California Public Records Act (CAL. GOV'T CODE § 6250 et seq.) pursuant to

CAL. GOV'T CODE § 6254(c)? (2) Is salary information about individually identified peace officers within the definition of confidential "personnel records" under CAL. PEN. CODE §§ 832.7 and 832.8, and thus exempt from disclosure under the Public Records Act pursuant to § 6254(k)? Fully briefed.

Lockheed Litigation Cases, 126 Cal. App. 4th 271 (2005), *review granted,* 2005 Cal. LEXIS 3888 (2005). S132167/B166347. Petition for review after affirmance of judgment. On a claim of workplace chemical exposure, does CAL. EVID. CODE § 801(b) permit a trial court to review the evidence an expert relied upon in reaching his or her conclusions in order to determine whether that evidence provides a reasonable basis for the expert's opinion? Fully briefed.

Lonicki v. Sutter Health Central, 124 Cal. App. 4th 1139 (2004), *review granted,* 2005 Cal. LEXIS 2778 (2005). S130839/ C039617. Petition for review after affirmance of judgment. (1) Under the provisions of the Moore-Brown-Roberti Family Rights Act (CAL. GOV'T CODE § 12945.2) that grant an employee the right to a leave of absence when the employee has a serious health condition that makes the employee "unable to perform the functions of the position of that employee," is an employee entitled to a leave of absence where the employee's serious health condition prevents him or her from working for a specific employer, but the employee is able to perform a similar job for a different employer? (2) Did defendant's failure to invoke the statutory procedure for contesting the medical certificate presented by plaintiff preclude it from later contesting the validity of that certificate? Fully briefed.

May v. Trustees of the California State University, decision without published opinion (2005) *review granted,* 2005 Cal. LEXIS 5971 (2005). S132946/H024624. Petition for review after affirmance of order for a new trial. Briefing deferred pending decision in *Oakland Raiders Football Club v. National Football League*, S132814, which presents the following issue: If the trial court fails to specify its reasons for granting a new trial (CAL. CODE CIV. PROC. § 657), is the trial court's order granting a new trial reviewed on appeal under the abuse of discretion standard or is the order subject to independent review?

Miklosky v. U.C. Regents, decision without published opinion (2005) *review granted,* 2006 Cal. LEXIS 6 (2006). S139133/ A107711. Petition for review after affirmance sustaining demurrer. Does the requirement of the Whistleblower Protection Act (CAL. GOV'T CODE §§ 8547-8547.12) that an employee of the University of California have "filed a complaint with the [designated] university officer" and that the university have "failed to reach a decision regarding that complaint within [specified] time limits" before
an action for damages can be brought (§ 8547.10(c)) merely require the exhaustion of the internal remedy as a condition of bringing the action, or does it bar an action for damages if the university timely renders any decision on the complaint?

Mills v. Superior Court, 135 Cal. App. 4th 1547 (2006) *review granted,* 2006 Cal. LEXIS 4402 (2006). S141711/ B184760. Petition for review after denial of peremptory writ of mandate. Further action in this matter is deferred pending consideration and disposition of a related issue in *Murphy v. Kenneth Cole Productions, Inc.*, S140308, *infra.*

Moran v. Murtaugh Miller Meyer & Nelson, decision without published opinion (2005) *review granted,* 2005 Cal. LEXIS 5385 (2005). S132191/G033102. Petition for review after affirmance of judgment. In assessing whether a vexatious litigant has failed to demonstrate a reasonable probability of success on his or her claim and should be ordered to furnish security before proceeding (CAL. CODE CIV. PROC. § 391.3), is the trial court permitted to weigh the plaintiff's evidence, or must the court assume as true all facts alleged in the complaint and determine only whether the plaintiff's claim is foreclosed as a matter of law? Fully briefed.

Murphy v. Kenneth Cole Productions, 134 Cal. App. 4th 728 (2005) *review granted,* 2006 Cal. LEXIS 2547 (2006). S140308/ A107219, A108346. Petition for review after affirmance in part and reversal in part of judgment. (1) Is a claim under CAL. LAB. CODE § 226.7 for the required payment of "one additional hour of pay at the employee's regular rate of compensation" for each day that an employer fails to provide mandatory meal or rest periods to an employee (see CAL. CODE REGS., tit. 8, § 11010(11)(D), 12(B)) governed by the three-year statute of limitations for a claim for compensation (CAL. CODE CIV. PROC. § 338) or the one-year statute of limitations for a claim for payment of a penalty (CAL. CODE CIV. PROC. § 340)? (2) When an employee obtains an award on such a wage claim in administrative proceedings and the employer seeks de novo review in superior court, can the employee pursue additional wage claims not presented in the administrative proceedings?

National Steel & Shipbuilding Co. v. Superior Court, 135 Cal. App. 4th 1072 (2006) *review granted,* 2006 Cal. LEXIS 4401 (2006). S141278/D046692. Petition for review after denial of writ of mandate. Further action in this matter is deferred pending consideration and disposition of a related issue in *Murphy v. Kenneth Cole Productions, Inc.*, S140308, *supra.*

Prachasaisoradej v. Ralphs Grocery, 122 Cal. App. 4th 29 (2004), *review granted*, 2004 D.A.R. 14910 (2004). S128576/ B165498, B168668. Petition for review reversal in judgment. Does an employee bonus plan based on a profit figure that is reduced by a store's expenses, including the cost of workers compensation insurance and cash and inventory losses, violate (a) CAL. BUS. & PROF. CODE § 17200, (b) CAL. CAL. LAB. CODE §§ 221, 400-410, or 3751, or (c) CAL. CODE. REGS. tit. 8, § 11070? Fully briefed.

Ross v. Ragingwire Telecommunications, 132 Cal. App. 4th 590 (2005), *review granted,* 2005 Cal. LEXIS 13284 (2005). S138130/C043392. Petition for review after affirmance of judgment. When a person who is authorized to use marijuana for medical purposes under the California Compassionate Use Act (CAL. HEALTH & SAF. CODE § 11362.5) is discharged from employment on the basis of his or her off-duty use of marijuana, does the employee have either a claim under the Fair Employment and Housing Act (CAL. GOV. CODE § 12900 et seq.) for unlawful discrimination in employment on the basis of disability or a common

law tort claim for wrongful termination in violation of public policy? Fully briefed.

Sacramento Police Officers Association v. City of Sacramento, 117 Cal. App. 4th 1289 (2004), *review granted*, 16 Cal. Rptr. 3d 625 (2004). S124395/C042493, C043377. Petition for review after reversal in judgment in action for writ of administrative mandate. Under what circumstances, if any, does a public agency's duty under the Meyers-Milias-Brown Act (CAL. GOV'T CODE § 3500 et seq.) to meet and confer with a recognized employee organization before making changes to working conditions apply to actions implementing a fundamental management or policy decision where the adoption of that decision was exempt under CAL. GOV'T CODE § 3504?

Siebel v. Mittlesteadt, 118 Cal. App. 4th 406 (2004), *review granted*, 12 Cal. Rptr. 3d 906 (2004). S125590/H025069. Petition for review after reversal in judgment. Where a post-judgment settlement agreement (1) revises a damages award, (2) provides for the parties to withdraw their appeals but does not provide for an amended judgment, and (3) expressly preserves the defendant's right to bring a malicious prosecution action, does the settlement agreement preclude a finding that the initial action was "favorably terminated" (in defendant's favor) for purposes of the defendant's subsequent malicious prosecution action? (Cal. Rules of Court, rule 29(a)(1).) Fully briefed.

Williams v. Genentech, Inc., 139 Cal. App. 4th 357 (2006), *review granted,* 2006 Cal. LEXIS 9970 (2006). S144327/A110611. Petition for review after affirmance in judgment. The court ordered briefing deferred pending decision in *Green v. State of California*, S137770 (#05-211), *supra.*

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now before it was whether or not the plaintiff was "qualified" for a regular permanent position.

Meanwhile, back to the state court litigation, some of the causes of action had been dismissed and the only remaining cause of action was for violation of the FEHA. The County successfully moved for summary judgment in August 2004. The trial court decided that although the plaintiff was a "qualified" person under the FEHA in that she was able, with or without an accommodation, to perform the essential tasks of her job, the County was nonetheless entitled to summary judgment. This was because the terms of public employment were fixed by statute (or ordinance) and not by contract. Since there was no implied contract to terminate only for good cause, and since the County was prohibited by its own ordinance from employing a temporary employee for more than 1040 hours per year, plaintiff had been properly terminated and was not entitled to an accommodation because that accommodation would extend her employment terms beyond their statutory limit. Plaintiff appealed.

All of the foregoing had been taking place in relative anonymity. However, the Ninth Circuit withdrew its unpublished memorandum decision and published a new per curiam decision on February 9, 2006. *Jenkins II*[3] and the California Court of Appeal continued to review plaintiff's appeal from the County's summary judgment in the state court, and ultimately published its decision as well.[4]

ANALYSIS BY THE COURTS

In "*Jenkins II*," the Ninth Circuit relied on these facts in deciding that plaintiff was "qualified" to be a permanent employee: plaintiff received exemplary performance reviews; plaintiff worked well in excess of the annual 1040-hour ceiling that the County ordinance had placed on temporary employees and her supervisors had never requested permission to work her beyond the 1040-hour limitation; plaintiff, on several occasions, took the examination for regular status, passing it more times than she failed; plaintiff interviewed several times for a permanent position but was never hired. The Ninth Circuit stated that the federal trial court had read the word "qualified" too narrowly in light of California law, and particularly the case of *Villain v. Civil Service Commission of San Francisco.*[5]

In *Villain* four temporary employees had taken written Civil Service examinations which they passed with scores placing them near the bottom of all of those who had passed.

> The plaintiffs' low ranking on the eligibility exam was central to the *Villain* court: [¶] Had the positions been classified as permanent, plaintiffs would not have been certified to them, for it is admitted that at the time of certification there were approximately 50 eligibles whose names preceded those of plaintiffs on the civil service list, a great number of whom would undoubtedly have been willing to accept the positions, if offered to them, as permanent employment. It was solely by reason of the fact that the positions were temporary, that the plaintiffs, although among the lowest 25% on the eligibility list, were able to secure a place upon the City and County payroll. . . .Also of importance to the court in *Villain* was the fact that the plaintiffs had not attempted to convert their status from temporary to permanent, even though they had several opportunities to do so. . . [¶] Applying *Villain*. . . the parties do not dispute that Jenkins worked far more hours than the maximum authorized for temporary employees. Nor do they dispute that Jenkins passed the written civil service examination on several occasions. Nor to they dispute that, in several instances, Jenkins was interviewed for a permanent position, reflecting the fact that her score on the written Civil Service examination was high enough to qualify her for a permanent position. Unlike the ordinance in *Villain*, County Ordinance 440 does not require that jobs go to the very highest scoring applicant; the hiring agency can choose from among those who attain high

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employment actions taken against them for traditional First Amendment activities. In fact, for most of our history, Justice Oliver Wendell Holmes' pronouncement—that "[a] policeman may have a constitutional right to talk politics, but he has no constitutional right to be a policeman"[5]—accurately reflected the absence of First Amendment protection in the public employment setting.

This is no longer the case. Starting with a series of decisions addressing the constitutionality of state statutes requiring public employees to take loyalty oaths and swear non-allegiance to the Communist Party, the Supreme Court began to chip away at this status quo.[6] Then in the landmark case *Pickering v. Board of Education*, 391 U.S. 563 (1968), the Supreme Court held that a public school teacher was entitled to First Amendment protection from termination in response to his letter to a local newspaper criticizing the school board's use of public funds. Such protection, however, was not absolute. While noting that public employees are constitutionally empowered to "comment[] upon matters of public concern" through speech engaged in "as the member of the general public", the Supreme Court also held that the public employee's interest in the subject speech must be weighed against the employer's legitimate interests in operating efficiently without undue disruption.[7] Most importantly, *Pickering* established for the first time that public employees cannot be deprived of their rights *as citizens* to participate in the free marketplace of ideas by virtue of their employment with the government.[8]

Fifteen years later, the Supreme Court re-visited these basic themes in *Connick v. Myers*, 461 U.S. 138 (1983), where a prosecutor was discharged after distributing to her co-workers a questionnaire (which was not prepared pursuant to her job duties) that addressed various issues (only one of which related to a matter of public concern). The Supreme Court upheld the plaintiff's termination because not only did the balancing of the competing interests weigh in favor of the employer but because the questionnaire dealt almost exclusively with the plaintiff's personnel grievance which did not involve a matter of public concern. Significantly, in evaluating the constitutional dimensions of the plaintiff's questionnaire, the Supreme Court explained that its repeated emphasis in *Pickering* of the right of public employees to speak "as citizens" was "not accidental."[9] The Supreme Court explained further, "The First Amendment was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people…*Pickering*…followed from this understanding of the First Amendment."[10]

Thus, *Pickering* and *Connick* did not hold, let alone suggest, that First Amendment protection in the public employment setting hinged simply upon the content of the subject speech. If the threshold for First Amendment protection was this simple, the disagreements among the federal circuits with respect to on-the-job speech would never have arisen. However, the absence of uniformity is understandable since the Supreme Court had not precisely explained where such speech fits in this constitutional calculus. The Ninth Circuit was one of the circuits that held that this kind of public employee speech is constitutionally protected. Constitutionalizing all such speech, however, could not be reconciled with the sound principle that protecting public employee speech goes hand-in-hand with maintaining our citizens' right to participate in and contribute to public discourse and debate.

THE NINTH CIRCUIT'S ALL-ENCOMPASSING APPROACH

It is against the backdrop established by *Pickering* and *Connick* that the Ninth Circuit's treatment of Richard Ceballos' First Amendment claim should be examined. Ceballos, a County of Los Angeles deputy district attorney, filed a 42 U.S.C. § 1983 civil rights action alleging that his First Amendment rights were violated when he was subjected to several adverse employment actions after having prepared a disposition memorandum recommending the dismissal of a pending criminal matter. Ceballos' recommendation was based on his review of a sheriff's deputy's statements in a search warrant affidavit and his personal observations of the search location. There was no dispute that Ceballos prepared his disposition memorandum in accordance with his ordinary prosecutorial duties. Ceballos' supervisors reviewed the case and decided to proceed with the prosecution, and convictions were obtained against each defendant. Subsequently, Ceballos claimed that he suffered retaliatory adverse employment actions when he was reassigned, transferred, and denied a promotion. While Ceballos' supervisors maintained that the challenged adverse employment actions had no connection to the disposition memorandum, the First Amendment claim was dismissed on summary judgment on the ground that the disposition memorandum was not constitutionally protected.

On appeal, the Ninth Circuit reversed the judgment below and held that the First Amendment protects *all public employee speech regarding matters of public concern*, regardless of whether the subject speech was the direct function of official job duties and therefore devoid of any element of "citizen speech."[11] The Ninth Circuit also held that Ceballos' claim survived the *Pickering-Connick* balancing test since the record did not show that the disposition memorandum was disruptive enough to justify the challenged adverse employment actions.

Unquestionably, the Ninth Circuit's holding would have opened the door to an increase in First Amendment claims, none of which could have been dismissed at the pleading stage (as long as the plaintiff merely alleged that the subject speech related to a matter of public concern). Accordingly, the County of Los Angeles sought Supreme Court review, relying primarily on the argument that the Ninth Circuit's approach of affording all speech regarding matters of public concern with constitutional protection could not be reconciled with the Supreme Court's repeated pronouncements regarding the direct nexus required between First Amendment protection for public employees and speech expressed in their capacity as citizens.[12]

THE LIMITING OF FIRST AMENDMENT PROTECTION TO SPEECH EXPRESSED "AS A CITIZEN"

In reversing the Ninth Circuit, the Supreme Court adhered to the principles

previously announced in *Pickering* and *Connick* and finally addressed head-on the question of whether public employee speech expressed pursuant to official job duties, as opposed to speech expressed "as a citizen," should be constitutionally protected. By holding that such speech falls outside the scope of First Amendment protection, the Supreme Court prevented the constitutionalization of every instance of public employee speech relating to a matter of public concern.[13]

In writing for the majority, Justice Kennedy reiterated that public employees "do not surrender their First Amendment rights by reason of their employment", but at the same time, the First Amendment protects them "in certain circumstances, *to speak as a citizen addressing matters of public concern.*"[14] Justice Kennedy explained further that when "employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively."[15] Conversely, "when public employees make statements pursuant to their official duties, the employees *are not speaking as citizens* for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[16]

It is also not surprising that the majority opinion echoed the statements in *Pickering* and *Connick* regarding the vital connection between First Amendment protection and public employees' "contributions to the civil discourse."[17] Accordingly, Justice Kennedy explained that "[r]efusing to recognize First Amendment claims based on government employees' work product does not prevent them from participating in public debate", and the "prospect of protection [for citizen-based speech] … does not invest them with a right to perform their jobs however they see fit."[18]

Justice Kennedy addressed another paramount dimension in this constitutional construct by recognizing that the Ninth Circuit's approach "would commit state and federal courts to a new, permanent, and intrusive role, mandating judicial oversight of communications between and among government employees and their superiors…."[19] Such a rule would therefore "demand permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with the sound principles of federalism and the separation of powers."[20] In other words, the Supreme Court recognized that abandoning the limitation of First Amendment protection to "citizen speech" will inevitably result in the planting of a constitutional seed in almost every public employment dispute—an unwanted consequence that it had already warned against in *Connick*.[21]

In applying these principles to the case at hand, Justice Kennedy explained that the "controlling factor" was that Ceballos' speech was expressed pursuant to his "official duties."[22] Consequently, Ceballos had not acted "as a citizen when he went about conducting his daily professional activities…."[23] The Ninth Circuit's decision was therefore reversed since the Supreme Court's "precedents [did] not support the existence of a constitutional cause of action behind every statement a public employee makes in the course of doing his or her job."[24]

POST-*GARCETTI* CONSEQUENCES

One obvious consequence of *Garcetti* is that public employers and their employees, and their counsel, must now be aware that speech expressed pursuant to official job duties will not give rise to an actionable First Amendment claim. Indeed, in just the two months since the publication of *Garcetti*, its holding has been treated as having brought clarity to this issue and has been applied to dismiss First Amendment claims based on such speech.[25]

On the other hand, there will invariably be cases where a plaintiff's First Amendment claim will be based on speech alleged to have been expressed *outside* the scope of his or her official job duties, thereby precluding the dismissal of that claim at the pleading stage (as long as the speech related to a matter of public concern). In such cases, defendants could prevail at the summary judgment stage by presenting sufficient evidence (1) that the subject speech was in fact expressed pursuant to the plaintiff's official job duties; (2) that the *Pickering-Connick* balancing test weighs in their favor (by showing that the subject speech caused undue disruption that justified the challenged action); or (3) that the adverse employment action was taken for legitimate, nonretaliatory reasons and not in response to the subject speech.

Garcetti may also have a profound impact beyond the nuts-and-bolts of First Amendment litigation. First, it may spur new state and federal legislation regarding the protections afforded to government "whistleblowers" in response to criticisms by some that *Garcetti* deprives constitutional protection for government employees who speak out about government waste and corruption. Such criticisms, however, are overblown. *Garcetti* in fact re-affirmed that public employees enjoy First Amendment protection when they engage in speech "as a citizen." Furthermore, relatively very few public employees are officially tasked with exposing misconduct. To the extent that some public employers may seek to further insulate themselves from constitutional liability by broadening the definition of their employees' duties, the Supreme Court addressed this concern by rejecting "the suggestion that employers can restrict employees' rights by creating excessively broad job descriptions. … [T]he listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes."[26] Nevertheless, based in part on some commentators' exaggerated concerns about the purported squelching effect that *Garcetti* will have on prospective government whistleblowers, the passage of stronger state and federal legislation designed to protect government whistleblowers from retaliation would not be unexpected.[27]

Second, as Justice Kennedy noted, *Garcetti* may also influence public employers to institute policies designed to encourage their employees "to voice concerns privately" since such "an internal forum for their speech will discourage them from concluding that the safest avenue of expression is to state their views in public."[28] This development is not unrealistic since some public employees may presume (incorrectly) that all of their internal communications would be constitutionally unprotected. While internal speech that is not expressed pursuant to official job duties could still be protected after *Garcetti*, public employers should be mindful of this possible misconception and consider having policies in place that will reduce the number of

employees "going public" with matters that could be productively addressed internally.

CONCLUSION

Almost 40 years after establishing public employees' entitlement to First Amendment protection when engaging in speech "as a citizen," the United States Supreme Court has in a certain sense come full circle by holding that public employees do not enjoy First Amendment protection when they engage in speech pursuant to their official job duties. This holding is not only consistent with fundamental principles regarding the purpose of the First Amendment and prior Supreme Court precedents, it also does not constitute a backward step—but rather an important and necessary clarification. *Garcetti* will ensure public employees' right to express themselves as other members of the general public and to immerse themselves in public discourse, while at the same time, allowing public employers to conduct their operations without burdensome concerns about First Amendment claims arising from everyday interactions with their employees.

ENDNOTES

1. *See, Pickering v. Board of Education*, 391 U.S. 563, 574-75 (1968); *Connick v. Myers*, 461 U.S. 138, 147 (1983). Accordingly, First Amendment claims in this setting have been subject to what has been commonly referred to as the *Pickering-Connick* balancing test.
2. Such speech occurs every day in every government office especially because the vast majority of this country's public employees routinely speak or write about matters of public concern while carrying out their ordinary job duties.
3. Affording First Amendment protection to all job-based speech regarding matters of public concern is precisely what the underlying Ninth Circuit decision required, as did several of its sister circuits. *Ceballos v. Garcetti*, 361 F.3d 1168, 1178 (9th Cir. 2004); *Lewis v. Cowen*, 165 F.3d 154, 161-64 (2nd Cir. 1999); *Baldassare v. New Jersey*, 250 F.3d 188, 197 (3rd Cir. 2001).
4. *See Mills v. State of Ala.*, 384 U.S. 214, 219 (1966) ("The Constitution specifically selected the press, which includes not only newspapers, books, and magazines, but also humble leaflets and circulars . . . to play an important role in the discussion of public affairs.").
5. *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 220 (1892).
6. *See, e.g., Daggett v. Bullitt*, 377 U.S. 360 (1964).
7. *Pickering*, 391 U.S. at 573-74.
8. This holding was certainly consistent with the Supreme Court's repeated recognition of the First Amendment's central purpose of preserving for all citizens the right to fully engage in public debate and the exchange of ideas. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) ("the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open"); *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 390 (1969) ("*It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas* in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee.") (emphasis added); *Pacific Gas and Elec. Co. v. Public Utilities Com'n of California*, 475 U.S. 1, 8 (1986) ("By protecting those *who wish to enter the marketplace of ideas* from government attack, the First Amendment protects the public's interest in receiving information.") (emphasis added).
9. *Connick*, 461 U.S. at 143.
10. *Id.* at 145.
11. *Ceballos*, 361 F.3d at 1178.
12. As Judge O'Scannlain urged in his special concurrence to the Ninth Circuit opinion, "the time has come for us to reappraise our jurisprudence concerning the free speech rights of the publicly-employed and the scope of legitimate governmental regulation in its capacity as employer." *Id.* at 1194.
13. Justice Kennedy authored the majority opinion in which Chief Justice Roberts, and Justices Scalia, Thomas, and Alito joined. Justice Souter wrote the main dissenting opinion in which Justices Stevens and Ginsburg joined, and Justice Breyer separately dissented.
14. *Garcetti v. Ceballos*, 126 S.Ct. 1951, 1957 (2006) (emphasis added).
15. *Id.* at 1958.
16. *Id.* at 1960 (emphasis added).
17. *Id.*
18. *Id.*
19. *Id.* at 1961.
20. *Id.*
21. *Connick*, 461 U.S. at 147-48.
22. *Garcetti*, 126 S.Ct. at 1960.
23. *Id.*
24. *Id.* at 1962.
25. *See, e.g., Mills v. City of Evansville*, 452 F.3d 646 (7th Cir. 2006) (police officer's intra-departmental criticism of department's plan to handle manpower shortage); *Gilder-Lucas v. Elmore County Bd. of Educ.*, 2006 WL 1736833 (11th Cir. 2006) (teacher's criticism regarding cheerleading tryouts).
26. *Garcetti*, 126 S.Ct. at 1961-62.
27. Almost all states already have statutes that provide whistleblowers with varying degrees of protection. California Labor Code § 1102.5 is one of the broadest.
28. *Id.* at 1961.

MCLE Self-Assessment Test

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Name _____ **Bar Number** _____ **E-mail** _____

1. Whether the speech at issue relates to a matter of public concern is an important factor in determining a public employee's entitlement to First Amendment protection.
❑ True ❑ False

2. In *Pickering v. Board of Education*, the Supreme Court explained that the employer's interests generally outweigh the First Amendment interests of the employee.
❑ True ❑ False

3. The plaintiff in *Garcetti v. Ceballos* based his First Amendment claim on speech that was expressed pursuant to his official job duties.
❑ True ❑ False

4. *Connick v. Myers* was the first Supreme Court case to recognize First Amendment protection for some public employee speech.
❑ True ❑ False

5. The Supreme Court has afforded the effects on workplace efficiency and effectiveness little weight in the determination of whether a public employee's First Amendment claim has merit.
❑ True ❑ False

6. Prior to *Garcetti*, public employees did not enjoy any First Amendment protection.
❑ True ❑ False

7. The plaintiff's questionnaire in *Connick v. Myers* was prepared outside the scope of the plaintiff's official job duties.
❑ True ❑ False

8. In *Garcetti*, the Supreme Court reversed the Ninth Circuit in light of its holding that public employees do not enjoy First Amendment protection when they engage in speech pursuant to their official job duties.
❑ True ❑ False

9. The Ninth Circuit found Richard Ceballos' disposition memorandum to be constitutionally protected speech.
❑ True ❑ False

10. The *Pickering-Connick* balancing test has been made obsolete by the holding in *Garcetti*.
❑ True ❑ False

11. Justice Oliver Wendell Holmes held that an individual's First Amendment rights are not curtailed by his or her employment with a government agency.
❑ True ❑ False

12. Employers are insulated from First Amendment litigation as a result of the holding in *Garcetti*.
❑ True ❑ False

13. The Ninth Circuit was not the only federal circuit to have adopted the position that all public employee speech relating to matters of public concern is constitutionally protected.
❑ True ❑ False

14. The plaintiff in *Pickering v. Board of Education* was terminated for speech expressed pursuant to his official job duties.
❑ True ❑ False

15. The Ninth Circuit's holding would have made it more difficult for employers to obtain dismissal of First Amendment claims based on on-the-job speech.
❑ True ❑ False

16. In light of *Garcetti*, public employers should consider modifying their policies, if necessary, to provide a readily-available forum for their employees to address their work-related concerns internally.
❑ True ❑ False

17. Under *Garcetti*, public employees who communicate with the media outside of their job duties are not deprived of First Amendment protection.
❑ True ❑ False

18. In *Connick v. Myers*, the Supreme Court held that the plaintiff had been terminated in violation of her First Amendment rights.
❑ True ❑ False

19. *Garcetti* deprives public employees of First Amendment protection for any speech expressed at work.
❑ True ❑ False

20. In *Garcetti*, whether the plaintiff's disposition memorandum was prepared pursuant to his official job duties was a matter in dispute.
❑ True ❑ False

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> scores and, in this case, chose Jenkins for interviews based on her high scores on several occasions. That it would have been permissible to hire an applicant under the applicable rules is all that California law requires for an applicant to be considered 'qualified' for a permanent Civil Service position...[6]

So stating, the Ninth Circuit held: "As Jenkins was 'qualified' for a regular position under California law, for purposes of this case she was a de facto 'regular' employee within the meaning of County Ordinance 440 at the time she was summarily terminated. Because she established that she was a de facto regular employee under the Ordinance, she had a property right in continued employment under the Fifth and Fourteenth Amendments."[7]

One might assume that that was good enough for the Fourth District Court of Appeal. Unfortunately for plaintiff that was not the case. The state appellate court, relying on virtually the same facts relied upon by the Ninth Circuit, held that the Ninth Circuit decision did not collaterally estop the state trial court's ruling on the County's motion for summary judgment. Under *Lucido v. Superior Court*,[8] an earlier ruling will be given collateral estoppel effect when (1) the issue is identical to that decided in the former proceeding; (2) the issue was actually litigated and (3) necessarily decided; (4) the doctrine is asserted against a party to the former action or one who was in privity with such a party; and (5) the former decision is final and was made on the merits. The Fourth District Court of Appeal disagreed with the Ninth Circuit on whether the statutory issued had been decided. The state appellate court concluded the Ninth Circuit wrongly held that the only issue was whether or not the plaintiff was "qualified" for permanent employment. Although the Court of Appeal conceded that the issue decided by the Ninth Circuit was the same in both the federal case and in the state court case, the federal decision was not binding because it is questionable whether the doctrine of collateral estoppel applied to pure questions of law. Since the Ninth Circuit's construction of California law was deemed wrong, the state court of appeal concluded Ninth Circuit decision was not entitled to collateral estoppel effect. The Fourth District Court of Appeal concluded that the summary judgment in state court had been properly granted because the plaintiff had failed to raise a triable issue of law. Ordinance 440 provided that temporary employees would not be permitted to work beyond the limit of 1040 hours per year unless an extension had been granted. The fact that she had been allowed to exceed 1040 hours in her final year as well as previous years did not mean that her employment ripened to permanent status; it only meant that the County had been derelict in enforcing its own rules. Since plaintiff was employed pursuant to statute, and not a contract, the County was "required" to terminate her. The fact that the County chose to do so after five consecutive years of employment in violation of that ordinance, and coincidentally shortly after she requested an accommodation for a workers' compensation disability, was irrelevant. Plaintiff had provided no factual dispute to show that the County's stated reasons were untrue, pretextual, or otherwise motivated by discriminatory animus, and therefore summary judgment was properly granted in the state trial court.

AFTERMATH

As noted in the introduction above, the plaintiff is seeking a depublication order of the decision of the Court of Appeal. The Fourth Appellate District did not originally order its decision to be published, but did so after a request from the County of Riverside. One can think of any number of reasons why the California Supreme Court would agree to depublish that opinion. One can also think of reasons as to why the state high court would not order depublication. Assuming plaintiff had no desire for an ongoing employment relationship with the County of Riverside, for all practical purposes, the district court's decision had no effect on her. The Ninth Circuit's decision remanded the matter back to the district court for an assessment of damages. Notwithstanding the California Court of Appeal decision, Jenkins is entitled to damages pursuant to the Ninth Circuit's ruling. The fact that plaintiff was seeking an accommodation to perform the essential functions of her job when terminated will undoubtedly play a role in the assessment of those damages. Had plaintiff been successful in the FEHA case in state court, what damages could she have collected? Very likely she could not collect the same damages in state court which she is entitled to in the federal action. At the very least the County of Riverside would be entitled to an offset in compensatory damages.

There are other questions that affect practitioners. We often see cases which are factually similar but which come to different conclusions. One of the reasons the legal profession exists is that lawyers are trained to assist the court by distinguishing cases and interpreting precedent and applying seemingly contradictory precedents to a set of facts in a current case. It is a rare occasion when a lawyer is called upon to explain the law when two cases come to opposite conclusions based upon the same facts and laws. The *Jenkins v. County of Riverside* cases are a lesson to us that judges are human and can see things differently. There is nothing rare or unusual about a 5 to 4 split on the United States Supreme Court, a 4 to 3 split among the Justices of the California Supreme Court, or a 2 to 1 split among the judges of the Ninth Circuit or a California Court of Appeal. In this case, the judges who differed with one another sit on separate courts and, as a result, have published conflicting precedential decisions. If both of these cases remain published it could be interpreted as attempting to mislead a court if a lawyer cited one of them without citing the other. At the same time, if a lawyer has a case involving whether a person employed as a temporary employee who claims status as a de facto permanent employee, a lawyer may be derelict in his or her duty to the client and the court to fail to bring these cases to the attention of the court.

This is the Dickens of a situation!

ENDNOTES

1. 398 F.3d 1093 (9th Cir. 2005).
2. *Jenkins v. County of Riverside*, 138 Cal. App. 4th 593 (2006).
3. *Jenkins v. County of Riverside*, 398 F.3d 1093 (9th Cir. 2005).
4. 138 Cal. App. 4th 593.
5. 18 Cal.2d 851 (1941).
6. *Jenkins v. County of Riverside*, 398 F.3d at 1096-1097.
7. 398 F.3d 1093, 1096-1098 (emphasis in the original).
8. 51 Cal.3d 3305 (1990).

Navigating Disability Requirements

continued from page 4

devices, whereas such measures are taken into account when determining whether someone is disabled under the ADA.[11]

Matt decides he needs more information to resolve the issue. However, since Tony did not actually request an accommodation, Matt does not know whether he should initiate the "interactive process" that the state and federal laws require.

SHOULD MATT INITIATE THE INTERACTIVE PROCESS?

Matt consults an employment law attorney who informs him that under most circumstances federal law does not require an employer to initiate the interactive process unless an employee makes a request for an accommodation. However, federal law contains an exception to this general rule if the employer recognizes the employee's need for an accommodation.[12] The lawyer explains that the obligation to initiate the interactive process arises when the employer (1) knows that the employee has a disability, (2) knows, or has reason to know, that the employee is experiencing workplace problems because of the disability, and (3) knows, or has reason to know, that the disability prevents the employee from requesting a reasonable accommodation.[13]

Based on the federal standard, Matt does not believe that he has an obligation to initiate the interactive process with Tony. However, the lawyer also explains that under California law employers have an affirmative duty to determine whether accommodations exist for an employee with a known disability, even if the employee has not requested such accommodations.[14] The lawyer identifies an inherent inconsistency in the FEHA. While the FEHA states that the interactive process does not arise until an employee makes a request for an accommodation, it also states that employers must provide a reasonable accommodation for employees with known disabilities without reference to whether the employee requested the accommodation.[15]

Given the inconsistency in the laws, and the fact ACE must comply with both the ADA and the FEHA, Matt decides to schedule another meeting before deciding whether he should initiate the interactive process. During this meeting, Matt tells Tony he is concerned about Tony's "uncontrollable" stress and perceived lack of work support. Tony replies that he does not blame Matt, or ACE generally, for causing his stress. He explains that he has been frustrated lately and irritable toward others. He adds that his doctor recently diagnosed his condition as post-traumatic stress disorder caused by combat he engaged in during the Gulf War. His symptoms, which have become more acute of late, include severe stress, depression, nightmares, and flashbacks. He tells Matt that he really needs help with the situation.

Matt asks Tony to provide a doctor's note verifying his need for an accommodation as required by ACE's personnel policies and authorized by the ADA.[16] Based on Tony's statements and the doctor's note, Matt concludes that Tony has a disability and probably needs accommodations from ACE. He schedules another meeting with Tony to engage in the interactive process.

MATT AND TONY ENGAGE IN THE INTERACTIVE PROCESS

Matt has participated in the interactive process before with other employees. He knows that California law does not describe what exactly should take place during the process, but he has a copy of guidelines published by the Equal Employment Opportunity Commission (EEOC), which suggest that the participants: (1) analyze the particular job involved and determine its purpose and essential functions, (2) ascertain the precise job-related limitations imposed by the individual's disability, (3) identify potential accommodations and assess the effectiveness of each, (4) consider the employee's preference, and (5) implement the accommodation that is most appropriate for both parties.[17]

Matt also realizes that if the employer and employee can find an immediate reasonable accommodation that works for the particular situation they will not have to follow this multi-step process. He has learned to approach each situation on a case-by-case basis and utilize only as many steps as necessary to determine if a reasonable accommodation exists for the employee. Matt also knows that if an employee refuses to cooperate, or causes the entire process to break down, ACE no longer has a legal duty to engage in the process.[18]

When Matt and Tony meet again, Matt asks whether ACE can provide Tony any accommodations to assist him in performing his job. Tony replies that he previously considered this issue and had several ideas, including working from home full time, restructuring his job so that he would not have to interact with customers for several months, transferring to an office position, or taking a leave of absence so he could obtain counseling. Matt tells Tony that he will consider his requests and get back to him with a response.

Following the meeting, Matt identifies several significant problems with Tony's suggestions. As a salesperson, Tony must travel extensively and interact with customers on a daily basis. ACE also has a strict transfer policy based on seniority, and although the company currently has one vacancy in an office position, an employee who has worked in the sales department for ten years already requested the position.

Matt reviews the reasonable accommodations materials he acquired from his ADA training. The materials state that an accommodation is considered "reasonable" if it is "feasible" or "plausible" and is effective in meeting the needs of the disabled individual.[19] Matt knows that typical examples of reasonable accommodations include job restructuring, part-time or modified work schedules, workplace restructuring, changing tests, training materials or policies, and reassignments to vacant positions. Matt also knows that ACE need not provide a reasonable accommodation to Tony if, even with the accommodation, he would pose a threat to his safety or the safety of others, but he does not believe Tony poses such a threat in this case.[20]

Tony's suggestions concern Matt because several of the options would make it difficult, if not impossible, for Tony to perform his job. Matt knows that

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Transgender Protections

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commented that his appearance and mannerisms were not "masculine enough" and initiated a plan to terminate him.[30] In response to defendants' plan to terminate him on account of his transsexualism, the plaintiff obtained legal representation and was ultimately suspended.[31]

Contrary to the lower court's holding, the Sixth Circuit maintained that the plaintiff in *Smith* stated a claim for relief pursuant to *Price Waterhouse*'s prohibition of sex stereotyping.[32] It noted: "After *Price Waterhouse*, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim's sex. It follows that employers who discriminate against men because they do wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex."[33] Analogizing the plaintiff's claim to that in *Price Waterhouse*, the Court held:

> Discrimination against a plaintiff who is transsexual—and therefore fails to act and/or identify with his or her gender—is no different from the discrimination directed against Ann Hopkins in *Price Watherhouse*, who, in sex-stereotypical terms, did not act like a woman.[34]

In so doing, the Court firmly expanded Title VII's protection against sex discrimination to transsexuals through a blanket prohibition against discrimination motivated by sex-stereotyping.[35]

Other courts have similarly held that transsexuals are covered under Title VII's protection against sex discrimination.[36] In *Schwenk v. Hartford*, the Ninth Circuit interpreted the Supreme Court's reasoning in *Price Waterhouse* to suggest that the terms "sex" and "gender" are interchangeable.[37] The Court further noted that for the purposes of setting forth a sex discrimination claim, what matters "is that in the mind of the perpetrator the discrimination is related to the sex of the victim," such as where a "perpetrator's actions stem from the fact that he believed that the victim was a man who 'failed to act like' one."[38]

Although some courts are moving in the direction of including transgender individuals within the purview of Title VII, many still deny transgender individuals protection. Since the circuits are split on this issue, a transgender individual bringing a claim of sexual harassment for gender discrimination in federal court will confront case law unfavorable to his/her position. However, claimants bringing their claims in California state courts will enjoy explicit protection against employment discrimination under the FEHA.

II. GROOMING CODE PROTECTION UNDER THE FEHA

Another critical difference between the FEHA and Title VII protection is language pertaining to dress codes. The 2003 Amendments added CAL. GOV'T CODE § 12949 to the FEHA, clarifying the employer's ability to set standards for workplace appearance:

> Nothing in this part relating to gender-based discrimination affects the ability of an employer to require an employee to adhere to reasonable workplace appearance, grooming, and dress standards not precluded by other provisions of state or federal law, provided that an employer shall allow an employee to appear or dress consistently with the employee's gender identity.[39]

This language may at first blush appear to diminish some of the protection that the 2003 Amendments provided to transgender individuals. However, under close examination, the statute may instead enhance protection under the FEHA by explicitly permitting employees to "appear or dress consistently with the employee's gender identity." This language grants an employee the freedom to reflect his/her gender identity at the workplace, even if it does not conform to his/her sex.

There is no similar dress code protection provided under Title VII. Courts have found no Title VII violation in gender-specific dress and grooming codes, so long as the codes do not disparately impact one sex or impose an unequal burden.[40] They have further permitted evenhanded and evenly applied grooming codes to be enforced even when based on highly stereotypical notions of how men and women should appear.[41] However, in light of *Price Waterhouse* and *Smith*, it is unclear how the plight of transgender individuals would fit into the unequal burden analysis.

Since transgender individuals do not identify with the gender roles associated with their anatomical sex, adherence to a strict dress code that reflects stereotypical notions of how men and women should appear can mean an extremely uncomfortable and unnatural demand for them. Still, because courts ignore the fact that sex and gender do not correspond for transsexuals in their application of the unequal burden analysis, dress codes that require transsexuals to reflect the gender associated with their sex are not found to be in conflict with Title VII. As a result, in many jurisdictions where "sex" is construed narrowly to mean biological characteristics, transgender individuals must either repress their gender identity or risk losing their jobs.

In *Schroer v. Billington*, however, District Court Judge James Robertson addressed this problem head on. Citing the District Court Judge Grady's decision in *Ulane v. Eastern Airlines, Inc.*, (*Ulane I*),[42] he suggested that "'sex is not a cut-and-dried matter of chromosomes,' [r]ather, it encompasses 'sexual identity,' which 'is in part a psychological question—a question of self-perception; and in part a social matter—a question of how society perceives the individual.'"[43] Judge Robertson further encouraged revisiting the position advanced in *Ulane I* that "discrimination against transsexuals because they are transsexuals is 'literally' discrimination 'because of... sex.'"[44] However, views of Judges Robertson and Grady are not uniformly accepted.

In a related matter, California's Fair Employment and Housing Commission (FEHC) issued a precedential decision on transgender discrimination in public accommodation under the Unruh Civil Rights Act.[45] In *Dept. Fair Empl. & Hous. v. Marion's Place*,[46] a male-to-female transgender individual asserted her right

to wear traditionally feminine clothing as a customer in a nightclub.[47] Finding no legitimate business reasons existed, the FEHC held the nightclub's dress code violated the Unruh Civil Rights Act,[48] because it "impermissibly and arbitrarily discriminates on the basis of sex . . . ."[49] However, citing to CAL. GOV'T CODE § 12949, the FEHC qualified that its decision was "a narrow one," because "the Legislature has recognized California employers' right to impose dress codes in the workplace, consistent with their employees' gender identity ...."[50]

While courts increasingly recognize the divide between "sex" and "gender" and the unfairness in permitting employers to require transgender individuals to satisfy a stereotypical male or female grooming standard, no firm conclusion has been made on these issues. In order for a transgender individual to make out a Title VII case on the ground that an employer's grooming code is sex discrimination, s/he must show that the code places an unequal burden on one sex or the other.[51] However, to satisfy a claim under the FEHA, a transgender individual needs to show that the employer's grooming code does not allow him/her to dress consistently with his/her gender identity.[52] This difference provides transgender individuals working in California greater protection against discrimination, because a showing of unequal burden is not necessary to satisfy a discrimination claim.

II. CONCLUSION

Transgender individuals have historically endured unbridled and ugly discrimination in the workplace. Until the past decade, they have struggled to repress or hide their gender identities to survive in the work environment. With promising decisions like the ones rendered in *Price Waterhouse* and *Smith*, they are finally offered a possibility of federal protection under Title VII. However, while some courts have boldly extended protection to transgender individuals, though under a general cover against gender stereotyping, others have flatly denied transgender individuals Title VII protection.

Luckily for California workers, the FEHA provides specific protection to transgender individuals by including "gender" into its definition of "sex." The FEHA further grants transgender individuals the freedom to outwardly express their gender identities in the workplace. Clearly, protection under California law is broader and more specific to transgender individuals. Title VII, however, offers promising hope for employees outside California that they will one day enjoy similar protections offered under the FEHA.

ENDNOTES

1. *Cf. Smith v. City of Salem, Ohio*, 378 F.3d 566, 572 (6th Cir. Aug 5, 2004); CAL. GOV'T CODE § 12926(p), amended by Assemb. Bill 196, 2003-2004 Reg. Sess., ch. 164, 2003 Cal. Stat. 1. CAL. PEN. CODE § 422.56(c), added by Sen. Bill 1234, 2003-2004 Reg. Sess., ch. 700, 2004 Cal. Stat. 5.
2. 42 U.S.C. § 2000e-2.
3. Assemb. Bill 196, 2003-2004 Reg. Sess., ch. 164, 2003 Cal. Stat. 1-2.
4. CAL. GOV'T CODE § 12900 et seq.
5. CAL. GOV'T CODE §§ 12926(p), 12949; see also CAL. PEN. CODE § 422.56(c).
6. CAL. GOV'T CODE § 12926(p).
7. *Id.*
8. *Id.*
9. CAL. PEN. CODE § 422.56(c).
10. Assemb. Bill 196, 2003-2004 Reg. Sess., ch. 164, 2003 Cal. Stat. 1.
11. CAL. GOV'T CODE § 12926(p); CAL. PEN. CODE § 422.56(c).
12. 42 U.S.C. § 2000e-2.
13. *Id.*
14. *Compare Ulane v. Eastern Airlines*, 742 F. 2d 1081, 1084 (7th Cir. 1984), *cert. denied*, 471 U.S. 1017 (1985) (TitleVII protection does not extend to transsexuals) with *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (differential treatment of men and women resulting from non-adherence to sex-stereotypes may be considered sex discrimination for purposes of Title VII protection), and *Smith*, 378 F.3d at 575 ("transsexual" label is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity).
15. Since its enactment, California courts have not issued any published decisions on the application of the Gender Non-Discrimination Act of 2003. However, in 2006, the Fair Employment and Housing Commission issued a precedential decision on the related issue of transgender discrimination in public accommodation. *Dept. Fair Empl. & Hous. v. Marion's Place*, No. 06-01-P, FEHC Precedential Decs., 2006 CAFEHC LEXIS 1 (Cal. F.E.H.C. Feb. 1, 2006). The decision refers to CAL. GOV'T CODE § 12949, the dress code provision under the 2003 Amendments. *Id.* at *31, n. 11. See discussion *infra* under II. Grooming Code Protection under the FEHA.
16. *Id.*
17. *See Ulane*, 742 F.2d at 1085 (Title VII does not protect transsexuals, the court stated: "The words of Title VII do not outlaw discrimination against a person who has a sexual identity disorder, i.e., a person born with a male body who believes himself to be female"). *See also Voyles v. Ralph K. Davies Medical Ctr.*, 403 F. Supp. 456, 476 (9th Cir. 1975) (employment discrimination based on one's transsexualism is not, nor was intended by the Congress to be, proscribed by Title VII of the Civil Rights Act of 1964); *Wood v. C.G. Studios*, 660 F. Supp. 176, 178 (E.D. Penn. 1987) (the term "sex" should be given its traditional meaning).
18. *Ulane*, 742 F. 2d at 1082.
19. *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000) (Title VII does not prohibit harassment or discrimination because of sexual orientation); *Ulane*, 742 F.2d at 1084 ("Congress manifested an intention to exclude homosexuals from Title VII coverage").
20. *Dobre v. National R.R. Passenger Corp.*, 850 F. Supp. 284, 287 (E.D. Penn. 1993) (Congress did not intend Title VII to protect transsexuals from discrimination on the basis of their transsexualism); *Wood*, 660 F. Supp. at 178; *Voyles*, 403 F. Supp. at 476.
21. *Price Waterhouse v. Hopkins*, 490 U.S. 228.
22. *Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000) (holding that the "initial judicial approach taken in cases such as Holloway has been overruled by the logic and language of *Price Waterhouse*"). *See also Smith v. City of Salem*, 369 F.3d 912 (6th Cir. 2004) later amended and superceded by *Smith*, 378 F.3d 566 (6th Cir. Aug 5, 2004).
23. *Price Waterhouse*, 490 U.S. at 232.
24. *Id.* at 272.
25. *Id.* at 251 ("As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for '[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.' *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 707, n. 13 (1978), quoting *Sprogis v. United Air Lines, Inc.*, 444 F. 2d 1194, 1198 ([7th Cir.] 1971)."
26. *Id.*
27. *Schwenk*, 204 F.3d at 1201 (the "initial judicial approach taken in cases such as Holloway has been overruled by the logic and language of *Price Waterhouse*.").
28. *Smith*, 378 F.3d at 575. ("Sex stereotyping based on a person's gender non-con-

forming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as 'transsexual,' is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity.")

29. *Id.* at 568.
30. *Id.*
31. *Id.* at 569.
32. *Id.* at 572.
33. *Id.*
34. *Id.* at 575.
35. *Id.*
36. *See Schroer v. Billington*, 424 F. Supp.2d 203, 213 (D.D.C. 2006); *Schwenk*, 204 F.3d 1187, 1202 (9th Cir. 2000) ("[d]iscrimination because one fails to act in the way expected of a man or woman is forbidden under Title VII.").
37. *Schwenk*, 204 F.3d at 1202.
38. *Id.*
39. CAL. GOV'T CODE § 12949, added by Assemb. Bill 196, 2003-2004 Reg. Sess., ch. 164, 2003 Cal. Stat. 2.
40. *See, e. g., Jespersen v. Harrah's Operating Co.*, 392 F.3d 1076 (9th Cir. 2004) (no violation of Title VII where employer's grooming code required each sex to conform to equally burdensome stereotypical standards); *Frank v. United Airlines, Inc.*, 216 F.3d 845 (9th Cir. 2000); *Harper v. Blockbuster Entertainment Corp.*, 139 F.3d 1385 (11th Cir. 1998); *Tavora v. New York Mercantile Exchange*, 101 F.3d 907 (2nd Cir. 1996). *See generally Carroll v. Talman Federal Sav. & Loan Asso.*, 604 F.2d 1028 (defendant's dress code, which required all of its female tellers, office and managerial employees to wear a uniform, whereas male employees in the same positions were only required to wear customary business attire, discriminated against plaintiff female employees in violation of Title VII).
41. *Schroer*, 424 F. Supp. 2d at 209.
42. *Ulane v. Eastern Airlines, Inc.*, 581 F. Supp. 821, 825 (N.D. Ill. 1983) (*Ulane I*) *rev. by Ulane*, 742 F.2d 1081.
43. *Ulane*, 742 F.2d at 1084.
44. *See Schroer*, 424 F. Supp. 2d at 212.
45. CAL. CIV. CODE § 51.
46. *Dept. Fair Empl. & Hous. v. Marion's Place*, 2006 CAFEHC LEXIS 1.
47. *Id.* at *6-7.
48. As incorporated in the FEHA by CAL. GOV'T CODE § 12948.
49. *Dept. Fair Empl. & Hous. v. Marion's Place*, 2006 CAFEHC LEXIS 1 at *31.
50. *Id.* at *31, n. 11.
51. *Id.*; *see e.g., Jesperson*, 392 F.3d at 1110.
52. CAL. GOV'T CODE § 12949.

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Wage & Hour Case Notes

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UCL Claims under Business & Professions Code § 17200 Are Not Preempted By the Fair Labor Standards Act

Harris et al. v. Investor's Business Daily, 138 Cal. App. 4th 28 (2006)

Telemarketers brought a class action suit alleging, *inter alia*, claims under the Labor Code for unpaid overtime and unlawful commission deductions, and an Unfair Competition Law (UCL) claim under Business & Professions Code § 17200, based upon violations of the Fair Labor Standards Act. Defendant argued that the UCL claim was preempted by the FLSA because traditional opt-out class actions are available in California, while FLSA collective actions require class members to opt in. The Court of Appeal held that the UCL claim was not preempted by the FLSA, and reversed the trial court's order sustaining defendant's demurrer. The Court cited numerous federal cases that had concluded that the FLSA does not preempt Section 17200 claims, because the purpose of the opt-in procedure is to protect employers from facing financial ruin and to prevent employees from receiving windfall payments, including liquidated damages. These concerns are obviated in a Section 17200 action that limits recovery to restitution. In addition, the FLSA's savings clause expressly contemplates that other laws may increase the FLSA's minimum requirements.

The Court of Appeal also reversed the lower court's summary adjudication order on plaintiffs' overtime and unlawful commission deductions claims. Regarding the overtime claim, the court found defendant had not demonstrated that more than half of the employees' compensation was from commissions and that employees had received more than one and one-half times the minimum wage, both of which are required for application of the commission exemption from overtime requirements. Regarding the unlawful commission deductions claim, the Court held that a triable issue of fact existed as to whether the employer's chargeback policy violated the Labor Code.

Following *Reynolds*, Labor Code Does Not Support Imposition of Personal Liability for Unpaid Wages on Corporate Officers or Agents as Employers

Jones v. Gregory, 137 Cal. App. 4th 798 (2006)

The Labor Commissioner sued Science Adventures ("SA"), a suspended California corporation, and its Chief Executive Officer, William Gregory, for failure to pay 45 former employees. Relying principally on federal authority, the Labor Commissioner argued Gregory fell within the meaning of "employer" in various Labor Code wage provisions and Industrial Welfare Commission Wage Orders. In a bifurcated trial, the trial court entered judgment jointly and severally against SA and Gregory for unpaid wages, unpaid vacation time, business expenses, interest, and waiting time penalties. Gregory appealed.

Guided by the California Supreme Court's recent decision in *Reynolds v. Bement* (2005) 36 Cal.4th 1075, the Court of Appeal reversed. The Court held that the plaintiffs' causes of action, grounded in specific Labor Code provisions, did not impose personal liability on a corporate agent for unpaid employee wages and expenses. Following *Reynolds*, the Court was unpersuaded by the plaintiffs' reliance on federal law for a broad definition of "employer." Unlike the FLSA, the Labor Code has no uniform definition for "employer," and thus the narrower common law test of employment governs. Under the common law, as specified in *Reynolds*, "corporate agents acting within the scope of their agency are not personally liable for the corporate employer's failure to pay its employees' wages."

Despite some limited support in *Reynolds*, the Court disregarded the Labor Commissioner's effort to distinguish this DLSE-prosecuted action from that of a private litigant. The Court also found inapposite the Wage Order's broad definition of "employer," as well as the varying definitions and uses of "employer" in Labor Code §§ 98.3, 1194.5, 240 and 210. The Court found no indication that the Legislature intended to incorporate any of these definitions or uses into the Labor Code provisions underlying the plaintiffs' specific causes of action.

The Court concluded by referencing Justice Moreno's observance in *Reynolds* that the broad definition of employer contained in Labor Code section 558, in conjunction with a Private Attorney General Act action, could open the door to future actions against corporate officers and agents.

Civil Code Section 3289's 10 Percent Prejudgment Interest Rate Properly Applied to Accrual of Unpaid Wages

Bell v. Farmers Insurance Exchange, 135 Cal. App. 4th 1138 (2006)

This is the fourth appeal in a complex wage and hour class action for unpaid overtime compensation. Following entry of judgment on the merits, which included prejudgment interest using the 10% rate provided in Civil Code § 3289, and after a separate and unrelated appeal and remand, defendant filed a motion for a nunc pro tunc order to determine the amount of prejudgment interest, or in the alternative, to correct a clerical error in the judgment. Defendant conceded that the 10 percent prejudgment interest rate applied by enactment of Labor Code section 218.6, effective January 1, 2001. However, defendant argued that prior to that date, interest should accrue using the 7 percent rate specified in the California Constitution, Article XV, § 1. The trial court denied the motion on various procedural grounds, and did not reach the merits regarding retroactive application of Section 218.6.

On appeal, the court affirmed on all three procedural bases. The court nevertheless went on to address the merits, holding that the 10 percent rate applies retrospectively to "all due and unpaid wages," regardless of when the right to the award accrued. In so holding, the court found that the statutory language and legislative history of Section 218.6 demonstrated that the provision clarified, rather than changed existing law.

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and the employer had permitted the wearing of other buttons, with statements such as "Medical Errors" and "Staffing Crisis." The majority, however, viewed the *Mt. Clemens* case as distinguishable because the message of the "FOT" button was "cryptic," whereas the instant button would cause a reasonable patient to be disturbed by its message.

A Lone Employee Picketing to Gain Recognition of the Union as Her Personal Bargaining Representative Is Not Engaged in Protected Concerted Activity

International Transportation Service, Inc. v. NLRB, 449 F.3d 160 (D.C. Cir. 2006)

In this case, the employer, a container terminal operator at the port of Long Beach, fired Deanna Tartaglia, a Payroll and Billing Representative and the only employee working in that job classification, after she and two non-employee union representatives picketed to gain recognition of the International Longshore and Warehouse Union as Ms. Tartaglia's bargaining agent. Although Ms. Tartaglia's position was not included within any recognized bargaining unit, unionized employees in other job classifications ceased work in solidarity with the picket line, such that Ms. Tartaglia's actions ultimately caused the employer more than $90,000 in losses, several hours' delay in loading and unloading containers and a mile-long line of trucks backed up at the port. The employer refused to recognize the union and fired Tartaglia for causing the disruption of its business. The union filed Unfair Labor Practice charges, alleging that the termination was an attempt to discourage her participation in a labor union, in violation of 8(a)(3), and that it interfered with employees' Section 7 rights, in violation of 8(a)(1).

An ALJ found that Ms. Tartaglia's termination violated both 8(a)(3) and 8(a)(1). The employer filed exceptions, arguing that Ms. Tartaglia's actions were unprotected because the Board could not certify a single-employee bargaining unit, and that the union's involvement in picketing the employer violated Section 8(b)(7)(C) of the Act, which prohibits employees and unions from engaging in recognitional picketing, unless they file a petition for a Board-supervised election within a reasonable period of time, not to exceed thirty days. After rejecting these exceptions, the Board affirmed the ALJ's decision and the employer appealed the matter to the Circuit Court of Appeals for the District of Columbia.

In a unanimous opinion, the D.C. Circuit Court of Appeals reversed, finding that because Section 8(b)(7)(C) of the Act prohibits recognitional picketing for single-employee bargaining units, Ms. Tartaglia's actions were not protected by Section 7 of the Act. Although several Board and court decisions over the decades have found that a lone employee may engage in protected, concerted activity for "mutual aid or protection," the Court refused to extend Section 7 protection to demands for collective bargaining on behalf of an individual employee. Because Section 8(b)(7)(C) has been read to prevent picketing where the Board will not certify the unit, a lone employee does not enjoy the protection of the Act when she demands *collective* bargaining for a one-person bargaining unit. The decision rejects Board precedent in the case of *Teamsters Local Union No. 115 (Vila-Barr Co.)*, 157 NLRB 588 (1966) in which the Board held that, although it cannot certify a single-person bargaining unit for purposes of collective bargaining, Section 8(b)(7)(C) does not prohibit a union from picketing for recognition of such a unit.

* The author wishes to thank Scott G. Miller for his contribution to these case notes.

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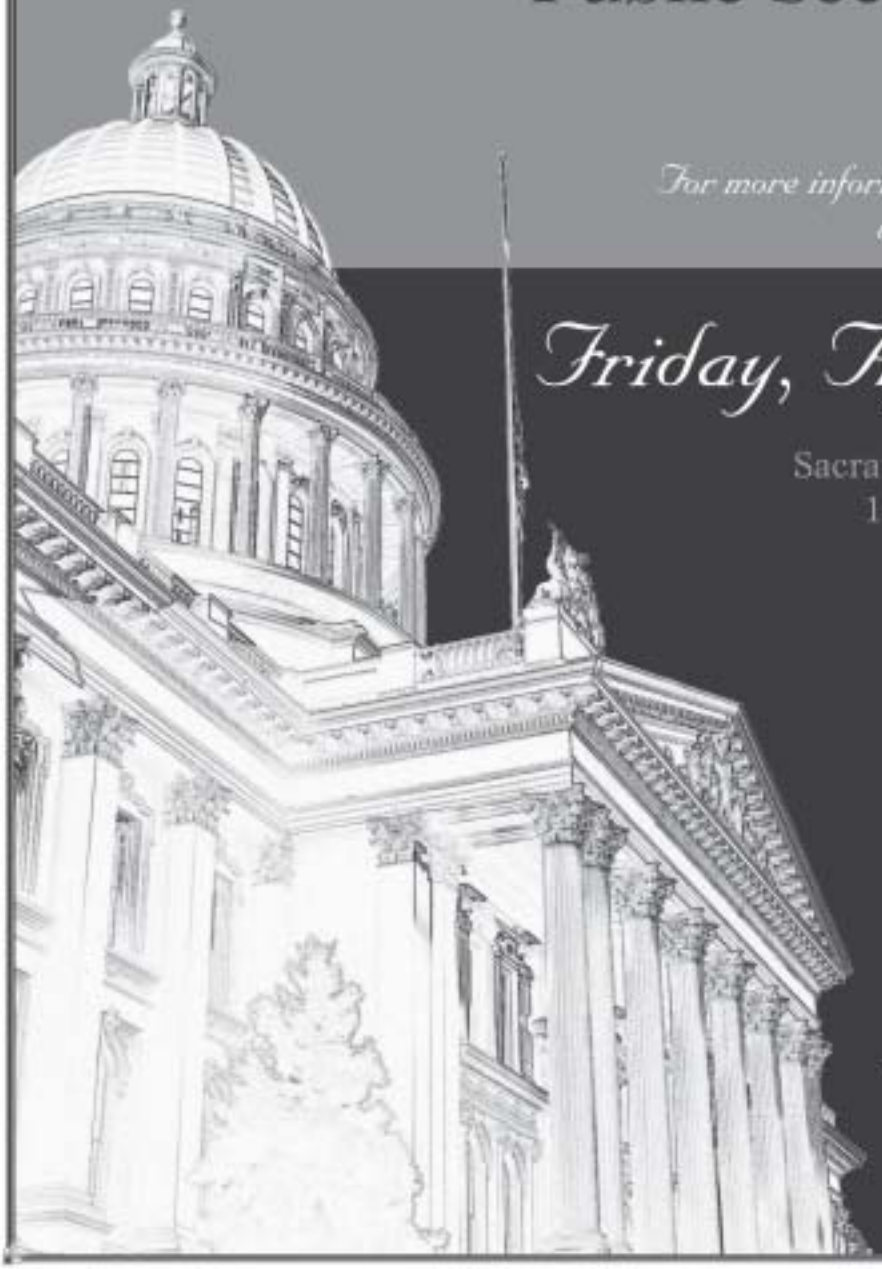

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vocational nurse who sustained an on-the-job injury. After years of treatment and efforts at rehabilitation, she was denied a service-connected disability retirement under the County Employees Retirement Law of 1937. She sued for back pay and benefits pursuant to Government Code section 31725. The petitioner maintained that she had been "effectively dismissed" because the County employer advised her that it had no ability to accommodate her "temporary" work restrictions and that she was being placed on industrial accident leave until the County was able to find a position for her. As in the *Stephens* case, the court determined the petitioner had not been dismissed. The court stated, if the County had informed petitioner of its inability to accommodate her permanent work restrictions and left it at that, she would have "a strong basis for asserting that she had been functionally terminated on the grounds of permanent disability." However, since the County offered her vocational rehabilitation to assist her in finding another position with the County, the employment relationship had not been severed.

DISABILITY RETIREMENT

County Is Required To File An Application For Disability Retirement When It Refuses To Reinstate An Injured Employee

Lazan v. County of Riverside, 140 Cal. App. 4th 453 (2006)

Unlike the cases above, this case did not arise under the County Employee Retirement Law of 1937. However, as in those cases, the issue involves when the County is obliged to regard an employee as disabled for purposes of retirement. This case involved a deputy sheriff who injured her back in the course of employment. Once she was deemed to be "permanent and stationary," with restrictions on performing her normal job duties, she filed an application for disability retirement. The County denied the application, finding that she was not disabled. The County directed her to report to work, but her supervisors said her work restrictions could not be accommodated. Thus, she was denied the right to return to work. The County later offered her a temporary clerical position and informed her that she was eligible for vocational rehabilitation on the ground that she could not perform her regular job duties. She again demanded that the County file an application for disability retirement on her behalf under CAL. GOV'T CODE § 21153. In response the County reversed itself, taking the position that she was able to perform the duties of a deputy sheriff. The petitioner filed a petition for a writ of mandate, which the trial court granted on the ground that she had effectively been separated from her employment. The judgment was sustained on appeal. The appellate court concluded there was substantial evidence supporting the trial court's finding that the County, by words and actions, had demonstrated that it believed that the petitioner was incapable of performing her duties as a deputy sheriff. Therefore, it was required to apply for disability retirement on her behalf.

PUBLIC SAFETY OFFICERS PROCEDURAL BILL OF RIGHTS

Change in Proposed Disciplinary Action Barred By One Year Statute Of Limitations For Punitive Actions

Sanchez v. City of Los Angeles, 140 Cal. App. 4th 1069 (2006)

After discovering facts which gave rise to proposed discipline of a police officer, the Police Department imposed a 20-day suspension. Paperwork prepared at the time indicated that the Department had declined to downgrade the police officer's salary status. However, after the expiration of the one year statute of limitations for punitive action set forth in Government Code section 3304, subd.(d) (Public Safety Officers Procedural Bill of Rights), the Department decided to pursue a downgrade in the employee's pay status. The City argued that the paperwork which indicated the Department was declining to downgrade the officer's pay status was sufficient to place him on notice within the one-year limitation. The Court of Appeal disagreed and held the matter was barred by the one-year statute of limitations. The court also rejected the trial court's conclusion that the error was cured because the Department offered the employee an administrative appeal. The Court of Appeal did not fault the officer for having failed to raise the statute of limitations in the administrative proceedings because to do so would have been futile.

STATE MAY CONTRACT OUT ARCHITECTURAL AND ENGINEERING SERVICES

Limitation On Contracting Out Architectural and Engineering Services Violates California Constitution Article XXII

Consulting Engineers and Land Surveyors of California, Inc. v. Professional Engineers in California Government, 140 Cal. App. 4th 466 (2006), review granted September 13, 2006 S145341. See discussion *supra* in *Cases Pending Before the Supreme Court.*

This case is another chapter in the long history of certain state employees' efforts to prevent the State of California from contracting out the duties they perform. The Civil Service Act, article VII of the California Constitution, has been interpreted repeatedly as forbidding private companies from contracting with the State to perform services that can be accomplished by state employees. In 1997 in *Professional Engineers v. Department of Transportation*, 15 Cal.4th 543 (1997), the Supreme Court found that the constitutional restriction on contracting out did not apply to "new functions" not previously performed by the State's department or agency but did apply to those functions which had historically or customarily been performed by State employees unless it was found that they could no longer do so adequately or competently. However, in November of 2000, California's voters approved Proposition 35, adding article XXII to the Constitution to allow the State to contract with private entities to obtain architectural and engineering services. Proposition 35 effectively exempted engineering and architectural services from the protection of article VII. Professional Engineers in California Government (PECG) has a collective bargaining agreement with the State that provides, except in "extremely unusual or urgent circumstances" the State must make every effort to use its own employees to perform architectural and engineering services for

public works projects before contracting out with private companies. Private engineering firms successfully enjoined the implementation of the collective bargaining agreement between PECG and the State. The court found that the agreement directly conflicted with California Constitution article XXII.

PEACE OFFICERS

Peace Officer Cannot Be Disciplined For Failing To Report Information Received While Off Duty.

Pinto v. City of Visalia, 139 Cal. App. 4th 1170 (2006)

The City of Visalia terminated the employment of a peace officer for failing to report alleged child abuse and for lying. While he was taking a coffee break in uniform, a woman informed him that her stepson needed advice about an ex-boyfriend. The stepson called the peace officer at home and informed him that he had broken off a relationship with his 16-year old boyfriend who was now harassing him. Subsequently, the peace officer met with the stepson at a coffee shop and was introduced to the ex-boyfriend. Later, while off duty, the peace officer "chatted" on the internet with the 16-year old ex-boyfriend. The peace officer later learned that the 16-year old had had sexual relations with another adult who may have been HIV positive.

The 16-year old eventually filed a police report making reference to having discussed these various matters with the peace officer. When the peace officer was interviewed during the criminal investigation, he falsely denied that the 16-year old had ever been in his house and also denied that he had had sexual relations with the adult with whom the 16-year old claimed to have had sexual relations. When these lies were discovered, the peace officer was terminated for failing to report knowledge of the adult having sexual relations with a minor and for lying about the extent of his own knowledge.

The peace officer petitioned for a writ of mandate, which was granted and affirmed by the court of appeal. Substantial evidence supported the peace officer's contention that he did not receive the information about the child abuse either in the scope of his employment or in a professional capacity, and thus he was not a "mandated reporter" under CAL. PEN. CODE §§ 11166 and 11165.7 subdivision (a)(19). Although he did not tell the truth about having had a relationship with the adult suspect, the Court held that termination was excessive for that infraction. The Court distinguished *Kolender v. San Diego County Civil Service Commission*, 132 Cal. App. 4th 716 (2005) (reported in this Review in February 2006) on the ground that the falsehoods told by the officer in that case were more serious misconduct, since he lied to cover up a fellow deputy's physical abuse of an inmate.

SCOPE OF BARGAINING UNDER MMBA

City's Fundamental Decision To Conduct A Racial Profiling Study Is Distinguished From Effects Of That Decision

Claremont Police Officers Association v. City of Claremont, et al., 39 Cal. 4th 623 (2006)

The City of Claremont's police commission decided to adopt and implement a "Vehicle Stop Data Collection Study" (Study) to determine whether Claremont police officers were engaging in racial profiling. The study required all officers on vehicle stops to complete a preprinted form which, on average, took two minutes to complete and officers, on average, completed between four and six forms during each 12 hour shift. The Claremont Police Officers Association (Association) requested that the City meet and confer over the study which it believed fell within the scope of representation under the Meyers-Milias Brown Act (MMBA). The Association contended that a change in working conditions arose from the possibility that officers might be disciplined if they were found to have engaged in racial profiling. Under the MMBA, Cal. Gov't Code sections 3504 and 3505 mutually obligate a public employer and an employee organization to meet and confer in good faith about a matter within the "scope of representation" concerning, among other things, "wages, hours, and other terms and conditions of employment." A fundamental managerial or policy decision, however, is outside the scope of representation, and is generally exempted from the meet and confer requirement. Cal. Gov't Code § 3504. The City disagreed that implementation of the Study triggered an obligation to meet and confer and declined to meet with the Association. Thereafter, the Association filed a writ of mandate compelling the City and the Department to not implement the study until after the parties met and conferred in good faith in compliance with the MMBA.

The Court of Appeals, reversing the Superior Court's denial of the petition, concluded that while the City's decision to "take measures to combat the practice of racial profiling and the public perception that it occurs is 'a fundamental policy decision that directly affects the police department's mission to protect and to serve the public . . . the decision precisely *how to* implement that fundamental policy, however, includes several variables affecting law enforcement officers and is not itself a fundamental policy decision.'" *Claremont Police Officers Association v. City of Claremont, et al.*, 39 Cal. 4th 623, 629-630 (2006).

The California Supreme Court reversed and held the fluid balancing test found in *Building Materials & Construction Teamsters' Union v. Farrell*, 41 Cal.3d 651 (1986) would apply in determining whether management must meet and confer when the implementation of a fundamental managerial or policy decision significantly and adversely affects a bargaining unit's wages, hours or working conditions. In applying the three part test, the Court held that based on the undisputed evidence in the case, the implementation of the study did not have a significant and adverse effect on the officers' working conditions. The impact on the officers' working conditions was de minimis and as a result, the Court did not need to balance the City's need for unencumbered decisionmaking against the benefit to employer-employee relations from bargaining about the subject. The City was not required to meet and confer with the Association before implementing the racial profiling study.

the law does not require an employer to eliminate or reassign essential job functions to accommodate an employee, so he questions the reasonableness of Tony's requests.[21] Matt also knows that the law does not require an employer to provide an accommodation that causes "undue hardship" to the employer. He reviews his ADA training materials which define "undue hardship" as an action that requires significant difficulty or expense when considered in light of several factors, such as (1) the nature and cost of the accommodation, (2) the size of the company, (3) the overall financial resources of the company and the site in question, (4) the number of persons employed at the company and the site, (5) the impact the accommodations would have on expenses, resources, and operations, (6) the type of the employers business, and (7) the structure of the workforce.[22]

Matt knows that allowing an employee to work from home can constitute a reasonable accommodation if the employee can perform the essential functions at home and it would not cause an undue hardship to ACE.[23] However, in this case, Matt decides that allowing Tony to work at home, or restructuring his position so he does not have to interact with customers, will not work because Tony's job requires significant travel and customer interaction.

Matt also decides that he cannot transfer Tony to an office position because a more senior employee in the company has claimed the only vacancy and ACE strictly enforces the seniority-based transfer policy. Matt does not realize that a recent U.S. Supreme Court decision supports his conclusion because the Court held that the ADA does not require an employer to grant an exception to a seniority system unless "special circumstances" exist, such as when the employer retains the right to unilaterally change the seniority system and routinely exercises that right.[24]

Matt concludes that granting Tony's request for a leave of absence provides the best option for all parties. However, Matt wants to set a time limit on the leave so he can sufficiently plan for Tony's absence. He knows that the law does not require employers to grant indefinite leaves of absence, so he decides that he will limit Tony's leave to three months.[25]

Matt meets with Tony again to discuss the plan. Although Tony would prefer to continue to work in some capacity, he agrees that taking time off to address his personal issues offers the best option all around. He tells Matt that he only wants to take a month off, at least to start, and they both agree to check in on Tony's progress in four weeks.

THE RESULTS

Three weeks after Tony begins his leave he informs Matt that he will need an additional month off. Since Matt anticipated that Tony's leave may extend beyond a month, he made necessary contingency plans and can accommodate Tony's request without much impact to the company. Tony ultimately returns to ACE after a two-month leave and performs very well the remainder of the year.

Tony's situation, though ultimately resolved to the satisfaction of all parties, illustrates numerous questions that can arise in employment disability cases. What triggers an employer's obligation to accommodate an employee? When is an employee disabled under the law? Should an employer initiate the interactive process if the employee has not requested assistance? What constitutes a reasonable accommodation? Matt handled these issues successfully, but the facts of each case differ and supervisors with less experience and resources may not have all the answers at their disposal.

Those who have attempted to navigate the legal requirements will likely agree that as the ADA and FEHA have evolved, ambiguities continue to arise and cause uncertainty and conflict between employers and employees. Courts will continue to address these issues and, hopefully, will eventually provide a clearer picture of the rights and responsibilities of all involved.

ENDNOTES

1. 42 U.S.C. § 12101, *et seq.*
2. *Knocking Down a Barrier*, NEWSDAY (Nassau and Suffolk Ed.), July 27, 1990, at 7.
3. Governor Frank Murkowski, *Fifteenth Anniversary of the Americans with Disabilities Act* (Jul. 19, 2005), at http://www.gov.state.ak.us/archive.php?id=1831&type=6.
4. Tony Coehlo, *Americans with Disabilities Act: Fifteenth Anniversary Statement by Tony Coelho, Chair, Board of Directors, Epilepsy Foundation*, at http://www.epilepsyfoundation.org/epilepsyusa/ada15.cfm?renderforprint=1&.
5. CAL. GOV'T CODE § 12900 et seq.
6. See 29 C.F.R. §§ 1630.13(a), 1630.14(a), (b).
7. *See Holihan v. Lucky Stores*, 87 F.3d 362, 365 n.3 (9th Cir. 1996); *see also Mustafa v. Clark County Sch. Dist.*, 157 F.3d 1169, 1174-75 (9th Cir. 1998).
8. *Diaz v. Federal Express Corp.*, 373 F.Supp.2d 1034, 1052-53 (C.D. Cal. 2005).
9. *Id.*
10. CAL. GOV'T CODE § 12926.1.
11. *Id.*
12. *See Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1114 (9th Cir. 2000), *vacated on other grounds by* 535 U.S. 391 (2002).
13. *Id.*; *see also Brown v. Lucky Stores, Inc.*, 246 F.3d 1182, 1188 (9th Cir. 2001).
14. *See Prilliman v. United Air Lines, Inc.*, 53 Cal. App. 4th 935, 950-51 (1997).
15. CAL. GOV'T CODE § 12940 (m), (n).
16. *See* EEOC Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA), 8 FEP Manual (BNA) 902:0181 (2000).
17. EEOC Interpretive Guide, 29 C.F.R. § 1630.9 App. (1999); *see also* CAL. GOV'T CODE, § 12926.1(e) ("affirming the importance" of the interactive process as outlined in the Interpretive Guide).
18. *See, e.g., Jensen v. Wells Fargo Bank*, 85 Cal. App. 4th 245, 263 (2000); *Humphrey v. Memorial Hospitals Ass'n*, 239 F.3d 1128, 1137 (9th Cir. 2001).
19. *See U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 402-03 (2002).
20. *See* CAL. GOV'T CODE, § 12940(a)(1); 42 U.S.C. § 12113.
21. *See* 42 U.S.C. § 12111 (8).
22. *See* CAL. GOV'T CODE, § 12926(s); 2 Cal. Code Reg. § 7293.9(b); 42 U.S.C. § 12111(10); 29 C.F.R. § 1630.2.
23. *See, e.g., Humphrey*, 239 F.3d at 1136.
24. *U.S. Airways*, 535 U.S. at 405.
25. *See, e.g., Myers v. Hose*, 50 F.3d 278, 282-83 (4th Cir. 1995).

Message from the Chair

By Wendy Rouder

Wendy Rouder is an arbitrator based in San Francisco. Prior to beginning her practice as a neutral, Ms. Rouder served for more than a decade as the supervising attorney for the labor and employment law unit of the Oakland City Attorney's Office.

This past year the State Bar's Labor and Employment Law section reached a landmark: our membership passed the 6,000 member mark. Why are 6,000 California lawyers paying $65 a year without an external mandate to do so? Is it because they want to fulfill their MCLE requirements? Has the $65 led to some meaningful networking? Does the payment create a resume opportunity? Or is there something else happening for the money?

I joined the Section back in the early 1980s. I am not sure I would have done so had my office not agreed to pick up the tab for "one Bar Section." I was interested in specializing in labor and employment because, as I am fond of saying, people give more time in their life to work than they do to any other activity, so service in that arena should be meaningful. I hoped the Labor and Employment Law section would provide me with a quick launch into "what those kinds of lawyers do." And it did. Over the years I have depended on the section for a substantial part of my professional education. However, it was not until the year 2000 that I realized that I ought to give back to the organization (hooray for millenniums inviting passing thoughts of beneficence) and I applied to join the section's Executive Committee. Now that I have attended several dozen Executive Committee meetings, have tried to take minutes when 22 lawyers are talking simultaneously, and have repeatedly asked "What do our section members want?", I step into the annually rotating role of Executive Committee Chair. This year I get a shot at asking not only orally, but also in writing this column, "What do our members want from the section?"

If any of you are reading this, will you now walk to your e-mail and send me a one line (or more) answer? I can be reached at wprouder@wendyrouder.com. Otherwise—or maybe even "additionally"—you can expect to be solicited again in the future for your answer(s) to this question.

The long-established mandate for Bar sections is to provide quality professional education in specialized areas of substantive law and law practice. The Bar's leadership has recently challenged the sections to consider how legal education is changing. For instance, in this information technology world, would a webcast or podcast better serve the practitioner than a two-day seminar hopefully at some location a little more appealing than Winnemucca, Nevada (come now, you didn't think in this context I would name a California city, did you)? Would you like to see some expanded concept of the underlying mission of our section or is the articulated mission just fine? Are you ready for 16 webcasts to substitute for one weekend seminar in Monterey? And what about substantive matters—have there been one too many seminars about the complicated overlay of employee leaves of absence when you really would like to know more about ERISA or about significant workplace issues in the hotel, hospital or aerospace industry?

There is a corollary plea that accompanies the queries here and those that will follow: consider becoming involved in our section's work. The tasks can be as big or as small as you have interest and time. Perhaps you could line up three speakers for a morning's workshop in Fresno or Eureka on the basics of employment law. Perhaps you or a colleague would like to address some interesting issue in a one-hour podcast? You might also consider contributing an article to our Law Review. These are my ideas on what you might offer. But it is truly your offering that I am seeking.

And with this burst of query and plea, I announce that I am looking forward to a year of being "Chief Nagger" of the Labor and Employment Law Section.

From the Editors

EDITORIAL POLICY

We would like the *Law Review* to reflect the diversity of the Section's membership in the articles and columns we publish. We therefore invite members of the Section and others to submit articles and columns from the points of view of employees, unions, and management. Our resources are you, the reader, so please provide us with the variety of viewpoints representative of more than 6000 members. In addition, although articles may be written from a particular viewpoint (i.e. management or employee/union), whenever possible, submitted articles should at least address the existence of relevant issues from the other perspective. For example, does the existence of a collective bargaining agreement affect the law on a particular subject? Thank you for all of your high quality submissions to date, and please…keep them coming! Please e-mail your submission to Section Coordinator Edward Bernard at edward.bernard@calbar.ca.gov.

The Review reserves the right to edit articles for reasons of space or for other reasons, to decline to print articles that are submitted, or to invite responses from those with other points of view. We will consult with authors before any significant editing. Authors are responsible for shepardizing and proof reading their submissions. Please follow the style in the most current edition of *The Bluebook: A Uniform System of Citation* and put all citations in endnotes.

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